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The Arkansas Supreme Court and the Civil War

BY LOGAN SCOTT STAFFORD *

Introduction

The Arkansas Supreme Court is scarcely mentioned in most histories of the Civil War in Arkansas.¹ This lack of attention, even in political histories of the conflict, is understandable since the court played a less important role in the conduct of the war than either the executive or legislative departments of state government. While the governor and General Assembly were forced to respond directly to the challenges posed by the war, the court spent most of the war years deciding cases that had been pending since before the conflict began. The court did not, however, escape completely from the effects of the war. The war dramatically altered the court's caseload, it imposed personal hardships on the individual justices, and it produced several legal controversies that ultimately reached the court. Unfortunately, the court's wartime role has been obscured by the failure of its own published reports to include several decisions directly related to the war.

The published opinions of the wartime court appear in volumes 23 and 24 of the Arkansas Reports. Volume 23 is devoted to cases decided during 1861. Volume 24 spans the period from 1862 through 1867. *McKenzie v. Murphy*,² which was decided during the June 1863 term of court, is reported at page 155 of Volume 24. The next opinion in volume 24 is *Rison v. Farr*,³ which was decided in 1865 after the war ended. Since by the autumn of 1863 the Union army had conquered the northern half of the state and occupied the state capital at Little Rock, this hiatus in the published reports leaves the impression that the supreme court ceased to function during the last two years of the war.

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This suggestion of judicial inactivity is partially corrected by a reporter's note that appears at the beginning of Volume 24. In March 1864, pro-Unionists in the northern half of the state adopted the Constitution of 1864, which became the *de facto* constitution of the state when the Confederate state government collapsed in May 1865. In August 1866 former supporters of the Confederacy won election to all three positions on the supreme court created under the Constitution of 1864. At the next term of court, held in December 1866, the three ex-Confederates on the court ordered that a number of cases decided during the war by the Confederate state supreme court be redocketed and reissued as the opinions of the post-war court. These opinions appear on pages 371 to 477 of volume 24 of the *Arkansas Reports*. Although they are credited to the Confederate state supreme court justices who originally wrote them, it is impossible to determine from volume 24 when or where each opinion was originally issued. The reporter's note at the beginning of volume 24 explains that these cases were pending in the Confederate state supreme court before ratification of the Constitution of 1864 but were decided by that court after ratification.

The reporter's note is not entirely accurate. During the nineteenth century, state supreme court opinions were initially recorded in handwritten form in large, bound volumes. The court's official reporter of decisions then prepared headnotes and summarized the arguments of opposing counsel before publishing the opinions in the *Arkansas Reports*. Eleven opinions decided by the Confederate state supreme court, both before and after the adoption of the Constitution of 1864, that appear in the handwritten records of the court were never published in the *Arkansas Reports*. Several of the "lost" opinions involved statutes or agencies of the Confederacy, and their expurgation from the *Arkansas Reports* left a gap in the historical record of the court.

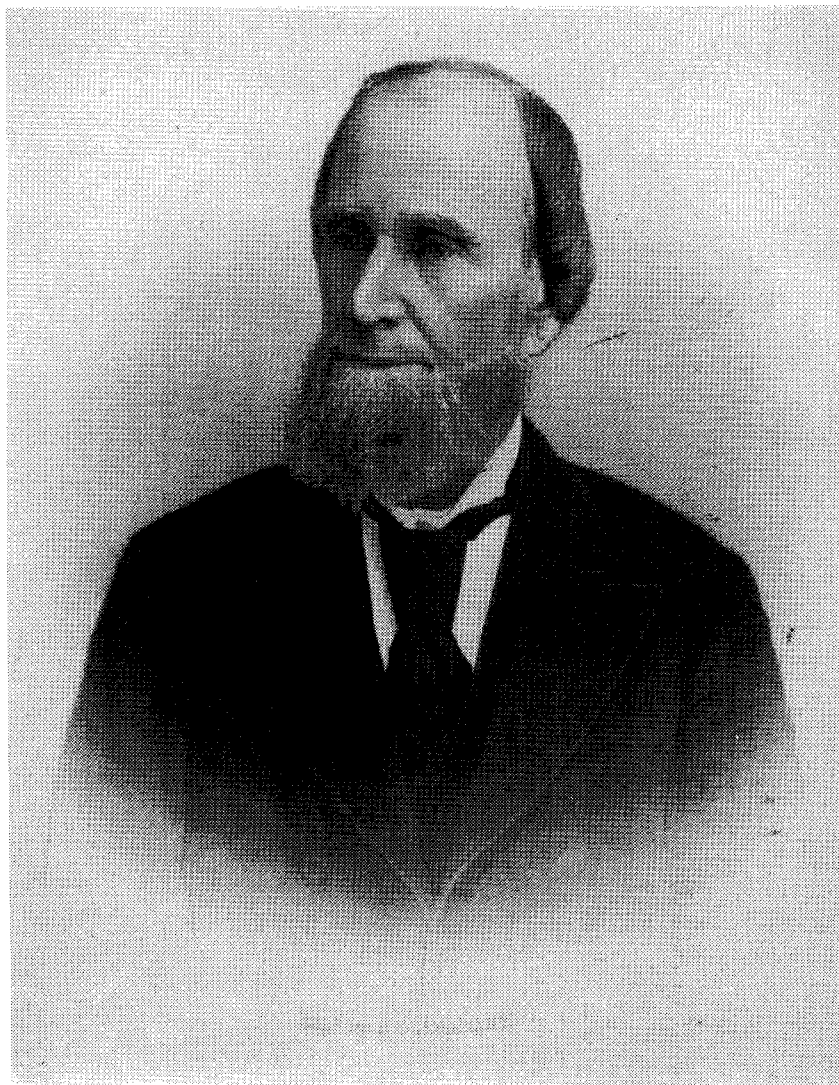
This article attempts to paint a more complete picture of the wartime history of the Arkansas Supreme Court. Using the original handwritten records of the Arkansas Supreme Court, contemporaneous newspaper reports, and extant correspondence of the justices, it reconstructs the activities of the court between January 1861 and April 1865. Although it discusses several cases that do appear in the *Arkansas Reports*, its primary focus will be

on the “lost” opinions from the war years that were never officially published.

The Supreme Court in 1860

On the eve of the Civil War the Arkansas Supreme Court consisted of three members, who were elected to eight year terms by the General Assembly.⁴ The constitution identified the three as “judges,” but it also stated that one of the three should serve as “chief justice,” and court members were referred to as “justice” in official reports of cases.⁵ The only constitutional qualification for service on the court was age; a justice had be at least thirty years old.⁶ Unlike the current Arkansas constitution, which requires a supreme court judge to be “learned in the law” and possess eight years of experience practicing law,⁷ there was no constitutional requirement in 1860 that a court member be licensed to practice law or have any legal training.

Until 1858 the supreme court met to hear cases twice a year, on the first Mondays in January and July.⁸ Because the constitution required the presence of at least two justices to transact business,⁹ the start of a term was often delayed until a second justice appeared. A term continued until the court disposed of all pending business unless the court deemed it “expedient” to adjourn sooner.¹⁰ Two terms a year proved adequate during the early years of statehood, but as the state’s population grew, the legislature increased the number of circuit and probate courts, and this proliferation of trial courts produced a corresponding increase in the appellate workload of the supreme court. The high court’s docket problems were exacerbated when the two associate justices failed to appear for the July 1858 term, and the chief justice was forced to adjourn the term without deciding any cases at all.¹¹ When the General Assembly met in November 1858, it passed legislation requiring the court to hold four terms a year, commencing on the first Mondays in January, May, July, and October, until the court’s docket was cleared. After that, the court could revert to holding two terms a year, but the statute required the justices to remain in session until the cases argued and submitted each term were decided.¹² The court was still meeting four terms a year as 1860 drew to a close.



Chief Justice Elbert English of the Arkansas Supreme Court. (Photograph source: *Encyclopedia of the New West*, Courtesy of the University of Arkansas at Little Rock Archives.)

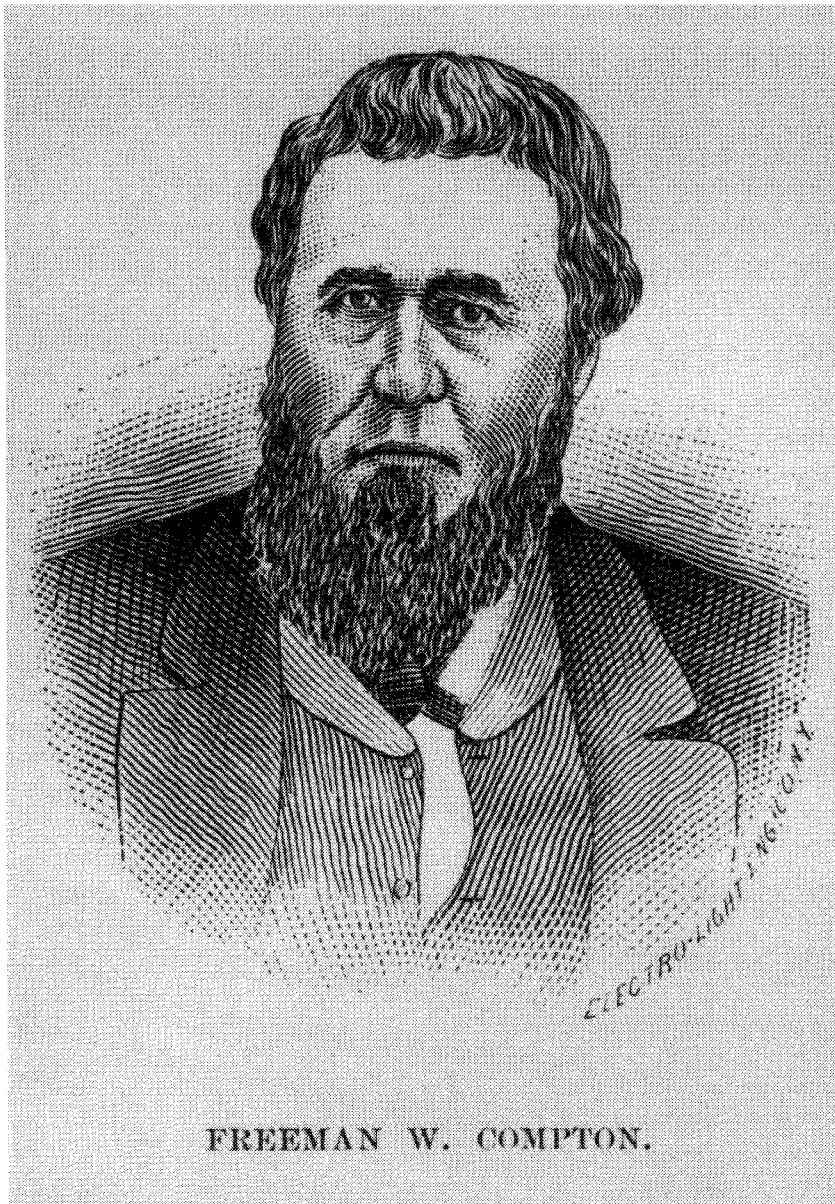
The Justices in 1860

The chief justice in the fall of 1860 was Elbert H. English, who played a leading role in the state's legal affairs throughout most of his life. English was born in Alabama in 1816 and considered a career in medicine before turning to the law. He studied law under the tutelage of George H. Houston, who later became governor and United States Senator from Alabama. Following English's admission to the bar in 1839 he practiced law in Alabama for four years and served two terms in the Alabama legislature. In 1844 he moved with his wife and two young daughters to Arkansas and opened a law office in Little Rock.¹³

Like most attorneys of the day, English's practice required him to travel throughout the state attending sessions of the various circuit courts. He supplemented his income from law practice by becoming the official reporter of the supreme court's opinions, a post to which the court appointed him shortly after his arrival in the state. English eventually published eight volumes of supreme court reports, covering the period from 1845 to 1853. They were originally titled "English's Reports," but during the last year of English's tenure as reporter the court dropped the practice of calling reports by the reporter's name and retitled English's works as volumes 6 through 13 of the Arkansas Reports.¹⁴ English also compiled an annotated digest of the laws of the state that the General Assembly adopted and published in 1848 as *English's Digest*.¹⁵ That same year he sought election to an associate justice position on the supreme court bench but was defeated by David Walker of Fayetteville.¹⁶ When Chief Justice George Watkins resigned in 1854, the General Assembly elected English to complete the last six years of Watkins' term,¹⁷ and in 1860 the legislature unanimously re-elected English to a full eight year term.¹⁸

English was a genial man who made friends easily. He had a reputation among lawyers as a conservative jurist who seldom departed from precedent when deciding cases. In politics he was a Jacksonian Democrat.¹⁹

Associate Justice Freeman W. Compton, who was thirty-seven years old in 1860, was a native of North Carolina where he had attended law school in Maxville, North Carolina. He was taught



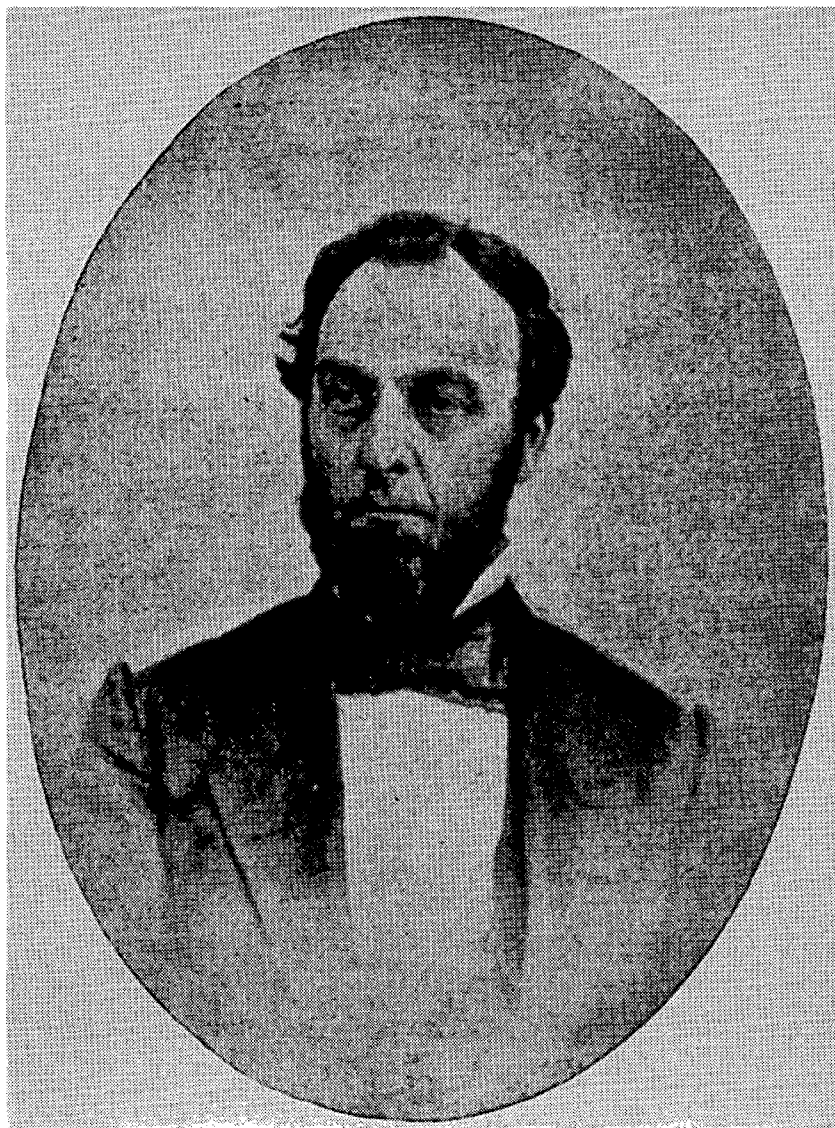
FREEMAN W. COMPTON.

Associate Justice Freeman W. Compton of the Arkansas Supreme Court. (Photograph courtesy of the J.N. Heiskell Collection, University of Arkansas at Little Rock Archives.)

by Chief Justice Richmond M. Pearson of the North Carolina Supreme Court. Compton was admitted to the bar at age twenty at Greeneville in eastern Tennessee and practiced there for several years before coming to Arkansas in 1849. He located at Princeton, in Dallas County, where his professional income together with his wife's money enabled him to become a successful cotton planter.²⁰ He was elected to the Arkansas Supreme Court in February 1859.²¹

Compton was a large man whose weight reached some three hundred pounds in his later years. He was a noted raconteur who, provided his listener had sufficient time, could be an entertaining conversationalist. Though somewhat loquacious and rambling when speaking, Compton's written output was clear and to the point. He tended to work at a slow, methodical pace, but his opinions were often creative and bold. Like his colleague English, Compton would move back and forth between private life and the high court over the next twenty years.²²

The third and newest member of the supreme court in the fall of 1860 was Hulbert F. Fairchild. Born in New York in 1817, Fairchild attended Williams College in Massachusetts but left during his senior year without completing a degree. He studied law and was admitted to practice in Kentucky before moving to northern Arkansas in 1841. He practiced law for a number of years, first in Pocahontas and later in Batesville. In 1855, the General Assembly created the state's first chancery court to deal with the legal fallout resulting from the failure of the state sponsored Real Estate Bank. Democratic Governor Elias N. Conway named Fairchild chancellor of the newly created court, despite Fairchild's affiliation with the Whig party. Many prominent politicians had been involved in the Real Estate Bank, and Conway's willingness to name Fairchild to the post was a testament to Fairchild's ability and his integrity.²³ Over the next four years Fairchild's adroit handling of the numerous controversies spawned by the collapse of the Real Estate Bank impressed the Arkansas bar,²⁴ and in February 1859 he was narrowly defeated for a supreme court seat by Freeman W. Compton.²⁵ When Associate Justice Henry M. Rector resigned in May 1860, Governor Conway named Fairchild to the vacancy.²⁶ Fairchild's appointment was effective only until the end of the next legislative session,²⁷ but when the legislature convened



Associate Justice Hulbert F. Fairchild of the Arkansas Supreme Court. Photograph courtesy of the J.N. Heiskell Collection, University of Arkansas at Little Rock Archives.)

in November 1860, it unanimously elected him to fill out Rector's unexpired term.²⁸

Fairchild was articulate and diligent, but his three-year tenure on the appellate bench would be too short to reveal a judicial philosophy. Many of the cases heard by the supreme court during his first years on the bench were appeals from decisions he made as chancellor, and Fairchild was forced to recuse.²⁹

The Question of Secession

Henry M. Rector, who was Fairchild's predecessor on the court, had served only fifteen months on the bench when he surprised the Arkansas political establishment by resigning his court seat to run as an Independent Democrat for governor against Richard H. Johnson, the nominee of the regular Democratic party. Johnson was a member of the Conway-Johnson "family" that had dominated Arkansas politics since the early days of statehood, and Rector's candidacy provided a rallying point for Arkansans who opposed the family. In a campaign based more on personalities than issues, Rector narrowly defeated Johnson in the August 1860 gubernatorial election.³⁰

On November 15, 1860, Rector was sworn in as governor by Justice Compton.³¹ Although the issue of secession had not figured prominently in the 1860 gubernatorial election, Rector delivered a fiery inaugural address calling for Arkansas to join other southern states if newly-elected President Abraham Lincoln adopted "coercive measures" to prevent secession.³²

Most members of the General Assembly did not share the governor's apocalyptic view of Lincoln's election or his enthusiasm for secession. During the weeks following Rector's inauguration, however, secessionists mounted an effective grass roots campaign that went unanswered by the less organized supporters of the Union.³³ Spurred by the secession of South Carolina, the house passed a bill on December 21, 1860, that provided for an election at which voters would decide whether to call a secession convention and at the same time would elect delegates in the event the vote favored a convention.³⁴ The senate held out until mid-January 1861 when it approved a similar bill.³⁵

The election took place on February 18, 1861, and the results reflected the ambivalence of most Arkansans toward

secession. The voters approved a convention, but a majority of the delegates elected to attend the convention were either pro-Union or at least willing to cooperate with other border states in seeking a peaceful solution to the nation's political crisis.³⁶ The delegates assembled in Little Rock on March 4, 1861, and debated the state's fate for two weeks before voting down a secession ordinance 39 to 35.³⁷ They then agreed to submit the question of secession to a plebiscite on August 5, 1861,³⁸ and adjourned until August 19, 1861, unless called back into session sooner by the convention's president.³⁹

January 1861 Term of Court

While the legislature and the convention debated whether Arkansas should withdraw from the Union, the supreme court held its January 1861 term. The court opened the January term on January 7, 1861, and thereafter met at 10 o'clock on each Saturday morning until April 18, 1861.⁴⁰ During the week the justices conferenced and drafted opinions. All three justices were present for most of the court's sessions, but Compton did not attend sessions after March 30, 1861.⁴¹

In January 1861 the court had still not worked off the congested docket that had prompted the legislature to require four terms of court a year. In a herculean effort, the justices managed to turn out 114 opinions during a three month period.⁴² The opinions gave no indication of the momentous events occurring elsewhere in the state and the country.

Secession Convention Reconvened

The agreement to refer the question of secession to a popular vote in August was overtaken by events in April 1861, when Confederate military forces fired on Fort Sumter in South Carolina and President Lincoln issued a call for volunteers to suppress the rebellion. Whatever their misgivings about secession, few Arkansans were prepared, at least in 1861, to take up arms against the other southern states, and almost overnight public opinion shifted in favor of secession.⁴³ Bowing to this pressure, the convention's president summoned the delegates back into session on May 6, 1861.⁴⁴ Within hours after reconvening, the convention voted to withdraw from the Union. Only five delegates voted against secession, and four of these changed

their votes in response to pleas for unanimity.⁴⁵

The Constitution of 1861

The delegates to the secession convention were not content merely to break the bonds between Arkansas and the United States. They remained in session for several weeks and adopted a new constitution for the state. The convention's authority for doing so is unclear. The legislative act scheduling a vote on a secession convention provided: "That upon the organization of said convention, it shall take into consideration the condition of political affairs, and determine what course the State of Arkansas shall take in the present political crisis."⁴⁶ While this vague language may have empowered the convention to draft and submit a new constitution for consideration by the voters, it is questionable whether the Arkansans who voted to call the convention intended to create a constituent assembly empowered to reframe the basic law of the state. Following the actual secession vote, however, a majority of the delegates became convinced that, as a convention elected by the people, they possessed plenary power to change the constitution and laws of the state. The task of drafting the constitution was referred to a committee on judiciary,⁴⁷ which reported a proposed constitution to the convention on May 28, 1861.⁴⁸ After two days of debate that included numerous floor amendments,⁴⁹ the convention adopted the new constitution on the afternoon of June 1, 1861.⁵⁰

The constitution approved by the convention changed the method of choosing supreme court justices. Instead of being elected to eight year terms by both houses of the General Assembly, supreme court justices were now to be appointed to eight year terms by the governor with the advice and consent of the senate.⁵¹ Although the reason for this change was not discussed in floor debate, the delegates may have been concerned about the ability of the legislature to meet during time of war.⁵² The first gubernatorial appointments were "to take place at the session of the General Assembly next before the expiration of the term for which the judges of the Supreme Court now in office expire,"⁵³ which ensured that the three incumbent justices would serve out the terms to which they had been elected under the Constitution of 1836.

May 1861 Term of Court

While the secession convention was meeting in the legislative chamber of the state capitol, the three supreme court justices held a session of court in the building's east wing. English and Compton convened court on May 6, the same day that the secession ordinance passed, but conducted no court business on that date.⁵⁴ Fairchild appeared on May 11, and the three justices met on that date and May 14, to hear oral argument and dispose of procedural motions.⁵⁵ Compton did not appear for court after the May 14 session. English and Fairchild met on May 18 and 24, and issued nineteen opinions, before adjourning for the term.⁵⁶

The three justices left no private record of their feelings about secession. According to the 1860 census records, all three owned slaves,⁵⁷ but slave ownership did not necessarily translate into support for secession. Officially, the justices endorsed the convention's decision. On May 21, 1861, the convention gave all state officers, including the three supreme court justices, forty-eight hours to appear before it and take an oath pledging support for the constitution of the Confederate States and forever renouncing allegiance to the constitution and government of the United States.⁵⁸ English and Fairchild were in Little Rock and immediately took the prescribed oath.⁵⁹ Since Compton had returned to his plantation at Princeton by that date, the convention passed a resolution authorizing him to take the oath before the circuit clerk of Dallas County.⁶⁰

June 1861 Term of Court

By statute the supreme court was supposed to meet for four terms a year until it caught up its docket.⁶¹ The May 1861 term was the last under the four-term schedule. Beginning in June 1861 and continuing throughout the remaining war years, the court would meet, or at least attempt to meet, two terms per year, beginning on the first Mondays in June and December.

The court issued no opinions during the June 1861 term. Only the chief justice appeared on June 3 for the start of the term, and he adjourned court for lack of a quorum.⁶² To prevent any disruption of the judicial system, the schedule to the new state constitution provided that all court proceedings were

continued "as if no change had taken place in the Constitution and government."⁶³ The court took this provision quite literally because nothing in its official records for June 1861 reflects that the court was operating under new state and federal constitutions or as part of a new country.

The court's records indicate that it remained inactive throughout the summer and fall of 1861. According to newspaper reports the chief justice spent much of that period touring the state as an agent for the Confederate government soliciting subscriptions of cotton to back Confederate bonds.⁶⁴ English and Compton did meet for several days during November 1861 and issued procedural rulings in pending cases.⁶⁵

December 1861 Term of Court

All three justices were present for the start of the December 1861 term of court, which ran from December 2, 1861 through January 19, 1862.⁶⁶ Fairchild was absent from December 19, 1861 until January 11, 1862, when he may have returned to his home in Independence County for the Christmas holidays.⁶⁷ Compton left after the January 11 meeting.⁶⁸ The court decided a total of fifty-four cases before recessing in mid-January.⁶⁹ English and Fairchild met again for two days in May 1862 and issued seven additional opinions.⁷⁰ Almost all of the cases decided during the December 1861 term had been in the judicial pipeline for several years, and none were directly related to the war. In the first year of war, the court's caseload was still geographically diverse. One fourth of the appeals heard by the court during the December term were from counties in the northern half of the state.⁷¹ By way of comparison, approximately thirty percent of the appeals heard during the January and May terms of 1861 were from northern counties.⁷²

June 1862 Term of Court

The second year of war did not go well for Arkansas Confederates. In March 1862, a Union army defeated a Confederate force at Pea Ridge in the extreme northwest corner of the state and began advancing down the White River into central Arkansas.⁷³ By mid-May Federal troops were only forty miles from the state capital at Little Rock,⁷⁴ prompting Governor Rector to order the state government moved to Hot Springs in

west central Arkansas.⁷⁵ The danger to the capitol did not ease until mid-summer, when the invading Union army turned east and occupied the Mississippi River port of Helena.⁷⁶

The supreme court was scheduled to convene for its June term on June 2, 1862. Although Governor Rector had returned the state government to Little Rock by the end of May, Union forces still threatened the state capital. All three justices appeared at the state capitol on June 2, but they immediately adjourned without hearing any appeals or issuing any opinions.⁷⁷ By August, the military situation in central Arkansas had stabilized, and the court reconvened for one week to consider a case with significant political implications.⁷⁸

The Constitution of 1861 continued in office all state officers holding commissions under the Constitution of 1836,⁷⁹ but buried in the 1861 document's schedule was a provision that escaped public notice when the constitution was adopted amid the excitement of secession. Section 5 of the schedule stated that the next general election of state officers was to take place on the first Monday in October 1862. Since the only state officer chosen by popular election was the governor,⁸⁰ the effect of section 5 was to cut two years off the four year term to which Governor Rector had been elected in 1860. The provision was added by floor amendment only moments before the convention approved the constitution.⁸¹ It was supported by regular Democrats, who were still smarting over Rector's defeat of their candidate in the 1860 election, as well as Unionist members of the convention, who resented Rector's heavy-handed efforts to push secession.⁸²

Rector's popularity had waned since his 1860 election, and the governor was understandably reluctant to stand for election in the fall of 1862. Consequently, the election proclamation he issued did not list the office of governor as among those to be filled at the October 1862 general election.⁸³ Christopher C. Danley, the editor of the *Arkansas Gazette* and a Rector opponent, argued that the omission was irrelevant because the law required the sheriff of Pulaski County, not the governor, to issue a general election proclamation.⁸⁴ Danley and Richard H. Johnson, Rector's Democratic opponent in the 1860 election, jointly filed suit in Pulaski County Circuit Court asking for a writ of mandamus ordering the sheriff to advertise the election of a governor

on the first Monday of October, 1862. Circuit Judge John J. Clendenin refused to grant the requested relief, and the plaintiffs took their request to the supreme court. Since resolution of the dispute could not wait until the December term of court, the three justices met on August 11, 1862 to decide *Danley and Johnson, ex parte*,⁸⁵ which does appear in the Arkansas Reports. They heard oral arguments on August 12th and issued their opinion the following day.⁸⁶

The threshold question presented by the case was whether the Constitution of 1861 had been legally adopted. As discussed above, the voters of the state never approved the 1861 document. A persuasive argument could be made that the secession convention exceeded its authority when it adopted the new constitution. In an opinion authored by Justice Fairchild, the court declined to rule on the constitution's validity. The opinion first laid out the dilemma posed by the question. If the court existed by virtue of the Constitution of 1836, it could not affirm the validity of the Constitution of 1861 without divesting itself of the power to decide the question. By the same token, if the court existed by virtue of the Constitution of 1861, it could not consider the question of the constitution's validity unless the constitution was in force. The court concluded that the constitutionality of the constitution was a political question which the judicial department alone was not competent to decide. Since all three justices had sworn allegiance to the new constitution and the other two departments of government had been acting under the new constitution for more than a year, the constitutionality of the Arkansas Constitution of 1861 was beyond judicial examination.⁸⁷

Once the court decided that the 1861 document was the operative constitution, the application of the language of that document to the question before the court was straightforward. Upon adoption of the new constitution on June 1, 1861, all officers elected under the 1836 Constitution ceased to hold office by virtue of their election prior to that date but continued to hold office by virtue of the 1861 Constitution. The 1861 Constitution provided for most state officials, including supreme court justices, to continue in office for a period measured by the term to which they were elected or appointed under the old constitution. It was silent, however, in the case of the governor,

secretary of state, auditor, and treasurer. Consequently, the governor was to serve until a new governor was elected in October 1862 general election, and the other three state officers were to serve until replaced by the General Assembly elected in October 1862.⁸⁸ Since the auditor and treasurer had been elected to two year terms in 1860,⁸⁹ the governor and the secretary of state were the only executive officers whose terms were cut short by the new constitution.⁹⁰

Rector reacted to the decision with a defiant address to the people in which he accused the supreme court of collaborating with his political enemies and fumed: "If the convention had intended to limit the term of the Governor, or to put him out entirely, it would have said so in plain, unmistakable terms."⁹¹ He had little choice, however, politically or legally, but to comply with the court's edict and submit to a re-election campaign in October 1862.⁹² By the fall of 1862, Rector had managed to alienate virtually every important political faction in the state and was easily defeated by Colonel Harris Flanagin, who was serving with the Confederate army in Tennessee.⁹³

December 1862 Term of Court

By the end of 1862 the Confederacy had lost control of the northern half of the state. The Union army stationed detachments in the major north Arkansas towns, but lacked sufficient forces to occupy much of the territory conquered in the second year of war. As a result of a June 1862 Confederate order encouraging the formation of partisan companies,⁹⁴ north Arkansas was soon swarming with Confederate guerrillas who raided Union garrisons, attacked Union supply trains, and harassed civilians sympathetic to the Union. In retaliation Union commanders launched counter-guerilla operations that did not always distinguish Confederate combatants from Confederate civilians. Further contributing to the anarchy that prevailed in the northern part of the state were bands of "bushwhackers" aligned with neither side, who took advantage of the collapse of civil government to kill and plunder.⁹⁵ North Arkansas was rapidly depopulated as civilians fled both north and south seeking the safety of more secure areas.⁹⁶

The December 1862 term of court reflected the breakdown of civil government in north Arkansas. Chief Justice English and

Justice Compton met for three days in early December before adjourning.⁹⁷ All three justices appeared for three additional days during the last week of January.⁹⁸ Of the nineteen opinions issued during the December 1862 term, only two involved appeals from decisions of courts in the northern half of the state. Both cases had been pending before the court since the first months of the war.⁹⁹

The most important decision of the December 1862 term was not issued until April 1863, when all three justices met to hear the first of several cases in which Arkansans used their state courts to challenge the authority of the Confederate military. Tension between the military and the state courts had first surfaced in 1862, when the Confederate military attempted to suspend writs of habeas corpus. The Confederate Constitution, like that of the United States, permitted suspension of writs of habeas corpus "when in cases of rebellion or invasion the public safety may require it,"¹⁰⁰ and in February 1862 the Confederate Congress approved legislation authorizing President Jefferson Davis to suspend writs in areas in danger of attack by Union forces.¹⁰¹ Davis immediately declared martial law, but only in certain areas of Virginia.¹⁰²

The lack of specific presidential authorization did not deter Major General Thomas C. Hindman, the commander of Confederate forces in Arkansas, from attempting to suspend the writ throughout the state when he declared martial law in the summer of 1862.¹⁰³ As Hindman explained in a report to the Confederate Inspector General:

Hence on June 30 I proclaimed martial law Occasional acts of injustice may have been committed, but in the main the greatest good of the greatest number of loyal citizens was promoted Many arrests were made; but, though the order proclaiming marital law plainly invited the civil authorities to reassert their jurisdiction, I never heard that the writ of *habeas corpus* was even spoken of, except in the case of a negro man who had attempted the rape of a white woman whose relations were in the army. The writ was not sued out and the negro was hanged, as he deserved to be.¹⁰⁴

The public reaction to Hindman's attempt to suspend writs of habeas corpus was not as quiescent as his report implies. On July 3, 1862, Albert Pike, a former Confederate general in command of troops in the Indian Territory and a persistent critic

of Hindman, wrote President Davis complaining that Hindman and his provost marshals were usurping powers that the Constitution delegated solely to the president.¹⁰⁵ The legality of Hindman's actions was also questioned by J.R. Eakin, editor of the *Washington Telegram*, who declared that in the absence of congressional authorization, martial law "is usurpation, and the civil law should not yield without a contest, not of arms but of principle, before the tribunals which may decide the appeal."¹⁰⁶

The controversy over the authority of the Confederate military to suspend writs of habeas corpus was defused before it reached the Arkansas Supreme Court. In response to civilian objections to the imposition of martial law in Arkansas and elsewhere in the south, the Confederate War Department issued a directive on August 6, 1862. It stated that military commanders had no authority to suspend writs of habeas corpus in areas under their control.¹⁰⁷ This was followed by a September 12, 1862 order annulling all proclamations of martial law previously issued by Confederate officers.¹⁰⁸ These actions failed to end martial law in Arkansas. In October the Confederate Secretary of War wrote to General Theophilus H. Holmes, who had replaced Hindman, and complained that reports of continued enforcement of martial law had reached President Davis.¹⁰⁹ Early in 1863 President Davis finally authorized General Holmes to suspend the writs of habeas corpus in Arkansas.¹¹⁰ Holmes did not use this authority and publicly expressed his hope that it would not become necessary for him to exercise any power "which would appear to be an interference of military with civil authority."¹¹¹

Although the various decrees emanating from Richmond throughout the summer and fall of 1862 made it clear that the writ of habeas corpus had not been suspended in Arkansas, they did not resolve whether the Confederate military was subject to the jurisdiction of the Arkansas courts. This became apparent when Arkansans held by the military began applying to state courts for writs of habeas corpus. By June 1863 the *Arkansas Gazette*, which had generally supported Hindman's martial law declaration, was complaining that:

Circuit and County Judges have issued the writ of *Habeas Corpus* and brought before them conscripts, deserters from the army, and jayhawkers or public enemies who were held by the military authorities as prisoners

of war, and we have heard of no case in which a man so brought before a Circuit or a County Court, in which he has not been discharged—the discharge violating law and defeating the ends of justice¹¹²

The conscription acts passed by the Confederate Congress in 1862 were responsible for many of the habeas petitions.¹¹³ The draft was extremely unpopular throughout the state, and Arkansans of all political stripes scrambled to qualify for one of the numerous statutory exemptions from conscription.¹¹⁴ By late 1862, the *Arkansas Gazette* was advertising preprinted forms for claiming an exemption as a physician, tanner, blacksmith, wagon maker, miller, shoemaker, millwright, or stock raiser.¹¹⁵ Many who were not fortunate enough to belong to a protected occupation sought a physician's certificate that they were medically unfit for military service.¹¹⁶ Confederate enrolling officers who refused to grant an exemption often became the targets of writs of habeas corpus issued by state courts.

Most habeas petitions filed by potential conscripts involved simple questions of fact—the petitioner either did or did not qualify for a particular exemption—but one controversial draft exemption posed legal questions. Because the Confederate Congress was concerned that forcing all able bodied white men into the army might lead to a slave uprising, the conscription act exempted “one person . . . on each plantation on which one white person is required to be kept by the laws . . . of any state.”¹¹⁷ The act further provided that if state law did not require a white person to remain on a plantation, then one white male on each plantation with at least twenty slaves was exempt from military service.¹¹⁸

The plantation exemption caused considerable confusion as applied to Arkansans. The scope of the exemption was discussed by Governor Flanagin and General Holmes at a conference on December 1, 1862, and afterwards Flanagin wrote Holmes:

The idea of a plantation in the South associates with it a considerable negro force, a negro quarter and an overseer or an owner who acts as overseer.

No one would call a farm cultivated by one or five negroes a plantation, while all would call one cultivated by forty or fifty, a plantation. The difficulty is in saying where the dividing line lies. There being no certain and definite rule, it seems that the Confederate authorities, must

of necessity, fix one in order to carry out the recent act of Congress in relation to conscript (sic).¹¹⁹



Hempstead County Courthouse. (Photograph courtesy of the Arkansas History Commission.)

Holmes complied with Flanagin's request by ordering all county enrolling officers in the state to follow the twenty-slave rule established by the Confederate Congress.¹²⁰

In addition to causing confusion, the plantation exemption aroused resentment, particularly among those white male Arkansans who did not own slaves.¹²¹ Since the early days of the war there had been grumbling that the war was prosecuted primarily for the benefit of slave owners.¹²² The inclusion of the plantation exemption in the unpopular conscription act sharpened the division between those Arkansans who owned slaves and those who did not. In December 1862, J.R. Eakin of the *Washington Telegraph* felt obliged to publish a lengthy defense

of the exemption. Eakin denied that the plantation exemption favored the rich since the owner of a thousand slaves who employed an overseer to supervise the slaves was still subject to the draft.¹²³ He also claimed that the services performed by a man who supervised slaves were just as vital to the Confederacy as the services of a conscript.¹²⁴ It is doubtful, however, that such arguments swayed many less wealthy Arkansans whose justification for avoiding the draft was summed up by the charge of "rich man's war, poor man's fight."¹²⁵

In April 1863, the supreme court reconvened to hear argument in a case that involved both the amenability of the Confederate military to state court writs of habeas corpus and the scope of the planter exemption.¹²⁶ *Ferguson v. Green*,¹²⁷ which does not appear in the Arkansas Reports, resulted from attempts by Elijah Ferguson, the Confederate enrolling agent for Hempstead County, to conscript Fernando C. Hebert. Hebert was of draft age, but he was the only white male on a plantation with ten slaves. The judge of the Hempstead County Court issued a writ of habeas corpus ordering Hebert released from military custody. Ferguson tried to persuade Circuit Judge L.B. Green to issue a writ of certiorari to the county court, and when the circuit judge refused, Ferguson petitioned the supreme court to issue a writ of mandamus ordering Green to review the county court's decision.

The high court ruled that the state courts of Arkansas could order the release of a person unlawfully held by the Confederate military. In doing so, the court traced the origins of the writs from the English common law courts, through the colonial courts under British rule and the state courts under the Articles of Confederation, to the respective federal and state courts under the United States Constitution. This constitutional scheme, under which the federal courts and the state courts possessed concurrent jurisdiction, carried over to the judicial system of the Confederate States. Hence, to determine the habeas jurisdiction of the Confederate state courts, it was necessary to look to pre-war precedents involving state courts of the United States.¹²⁸

The court then discussed numerous early nineteenth century state supreme court decisions, most of them issued by northern supreme courts during the War of 1812, which upheld the right of state courts to order the release of recruits held by the United

States armed forces.¹²⁹ Unfortunately, this line of state cases was overruled by an 1858 United States Supreme Court decision that, ironically, was widely applauded in the south when it was issued. In *Ableman v. Booth*,¹³⁰ the United States Supreme Court ruled that a Wisconsin state court could not order the release of a prisoner held in federal custody following his conviction in federal court for aiding the escape of a fugitive slave. The Arkansas Supreme Court dismissed *Ableman* as a “flagrant intrusion” into federal jurisdiction by a state court motivated by “miserable fanaticism”¹³¹ and concluded that it did not overrule earlier state cases involving persons held illegally by the United States military.¹³²

There was one other legal obstacle to issuance of the writs. Arkansas had a statute regulating habeas corpus which stated: “No person shall be discharged under the provisions of this act, who is in custody or held by virtue of any legal engagement or enlistment in the army or navy of the Confederate States; or who, being subject to the rules and articles of war, is confined by any one legally acting under the authority thereof”¹³³ This language, according to the Arkansas Supreme Court, did not prevent a state court from inquiring into whether the engagement or enlistment was “legal” or whether a person was actually subject to the rules and articles of war.¹³⁴

Having decided that the courts of Arkansas did have the power to issue writs of habeas corpus when Confederate military authorities held persons contrary to law, the court proceeded to the substantive issue of defining a plantation for purposes of conscription. Since Hebert’s plantation clearly failed to qualify under the twenty-slave rule established by the Confederate Congress, the question was whether Arkansas law pre-empted the congressional definition of a plantation. During the months following secession, rumors of slave uprisings¹³⁵ prompted the General Assembly to enact a criminal statute which provided:

That any person occupying a plantation with slaves, be bound to have thereon a white person to oversee and maintain good order among them, provided he or she does not remain on said plantation in person, and on failure to do so, on conviction thereof, he or she shall be fined not less than fifty, nor more than one hundred dollars, for each month said plantation shall be without such white person¹³⁶

The legislature was not attempting to define an exemption from conscription because the Arkansas criminal statute predated by several months the first Confederate conscription act. The supreme court nevertheless decided that the criminal statute defined which Arkansans were liable to military service. According to the court, the Confederate Congress intended to allow each individual state to determine under what circumstances a white person was needed to supervise slaves, and the 1861 criminal statute indicated that the policy of Arkansas was to require the presence of a white person on any plantation with slaves, regardless of the number of slaves.¹³⁷

The ultimate disposition of *Ferguson v. Green*¹³⁸ belied the important issues addressed in the opinion. The supreme court granted Ferguson's request for a mandamus and ordered Judge Green to review the county court's issuance of the writ freeing Fernando Hebert and decide the case consistent with the supreme court's opinion.¹³⁹ In the process, however, the supreme court had clearly confirmed that Confederate military officials were subject to the writs of habeas corpus issued by the Arkansas courts.¹⁴⁰

The court's decision received mixed reviews from the Arkansas press. It was attacked by the *Gazette's* Christopher C. Danley, whose brother, B.F. Danley, was commandant of conscripts for the state. Danley argued that the Confederate district courts had exclusive jurisdiction to interpret the conscription laws passed by the Confederate Congress and offered an interesting analogy:

This usurpation of jurisdiction by our State Courts is but following the precedents of the Northern courts when they declared the Fugitive Slave Law unconstitutional, and freed fugitive slaves under writs of *Habeas Corpus*. The illegal discharge of a soldier of our army, or of a prisoner of war held by it, is as great an outrage upon the Southern people as ever was the illegal discharge of a Southern man's slave by a Northern court

. . . .¹⁴¹

J.R. Eakin of the *Washington Telegraph* applauded the decision. In an editorial entitled "Judicial Writs—The Ministers of Freedom," Eakin described the "military despotism" imposed on the people of the north by President Lincoln and asserted:

We congratulate ourselves and our countrymen upon the contrast which the South presents. Our judicial tribunals still take careful cognizance of any and all cases affecting personal liberty of citizens. Whilst they sustain with patriotic purity the military authority in all its legitimate powers, they continue to draw lines more plainly between the constitutional powers of the civil and military departments.¹⁴²

*Ferguson v. Green*¹⁴³ settled the scope of the plantation exemption, but that aspect of the decision was short lived. By the spring of 1863 the Confederate Congress realized the error of allowing each state to decide when a white man was needed to supervise slaves. On May 1, 1863, less than a month after the supreme court decided *Ferguson v. Green*,¹⁴⁴ Congress amended the exemption act to apply a uniform twenty-slave rule throughout the south.¹⁴⁵ Moreover, the exemption was available only when the plantation was the property of "a minor, a person of unsound mind, a *femme sole*, or a person absent from home in the military or naval service."¹⁴⁶ As a result of this change the only draft-age white males who qualified for an exemption were overseers on plantations owned by a member of one of the enumerated classes.

June 1863 Term of Court

The court began its June 1863 term on June 1, 1863, with Chief Justice English and Justice Fairchild present.¹⁴⁷ Justice Compton did not appear during the entire term and may have remained at his plantation in Dallas County. Despite a worsening military situation, English and Fairchild met intermittently throughout the summer of 1863 and issued nine opinions.¹⁴⁸ Several were war-related.

In *Burt v. Williams*,¹⁴⁹ which does appear in the Arkansas Reports, the court considered an attempt by the Arkansas General Assembly to put all court proceedings on hold for the duration of the war. By the summer of 1862, civil government had disappeared completely in those areas of the state beyond Confederate control, and even in Confederate-held Arkansas, most trial courts had ceased to function. The resulting chaos was described in an August 6, 1862 *Washington Telegraph* editorial: "We were never in such a political condition before. Everything

pertaining to the administration of justice and the regulation of business intercourse and the protection of civil rights is in a State of disorganization.”¹⁵⁰ When the Sevier County Circuit Court held a regular term of court on the first Monday in September 1862, the *Telegraph* deemed the event sufficiently remarkable to merit a lengthy observation on the virtues of a civil justice system.¹⁵¹

The legislative response to the collapse of the court system was a December 1862 act which stated: “That all suits in law or equity now pending or hereafter commenced in any courts of this State shall be continued until after the ratification of peace between the United States and the Confederate States.”¹⁵² In an opinion authored by Fairchild and delivered on June 16, 1863,¹⁵³ the court ruled the act unconstitutional on three grounds. First, the act violated the constitutional right to a speedy trial of those persons accused of crimes.¹⁵⁴ Second, the act unconstitutionally impaired the obligation of contracts by destroying or delaying any remedy for a breach of contract.¹⁵⁵ Finally, and perhaps most influential with the court, the act was an attempt by the legislature to exercise judicial functions reserved exclusively to the courts by the separation of powers clause of the constitution.¹⁵⁶

On the same day it handed down *Burt v. Williams*, the court decided *State v. Clendenin*.¹⁵⁷ The latter case was a product of the October 1862 general election. The proclamation issued in response to the court’s decision in *Danley and Johnson, ex parte* called for the election of *all* members of the Arkansas senate. Oliver H. Oates had been elected in August 1860 to a four year term as senator from Phillips and Monroe counties.¹⁵⁸ He was re-elected to the same office in the general election held in October 1862. When the General Assembly met in November 1862, it elected Oates as secretary of state.¹⁵⁹ Since the 1861 constitution barred the election of a legislator to any office “within the gift” of the General Assembly,¹⁶⁰ the attorney general filed an application for a writ of *quo warranto*¹⁶¹ in Pulaski County Circuit Court challenging the right of Oates to hold the office of secretary of state. Circuit Judge Clendenin refused to grant the application, and the attorney general applied to the supreme court.¹⁶²

The court ruled that Oates could be elected secretary of

state. Arkansas' Constitution of 1836 set four year terms for senators. However, to ensure the election of half the senators every two years, it divided the senators into two classes and provided that senators of the first class would serve an initial term of two years and thereafter four years.¹⁶³ Under this classification system, Oates was a senator of the second class elected in 1860 to a four year term. The Constitution of 1861 retained four year terms for senators and provided that the "election of Senators shall take place at the time now appointed . . . by law."¹⁶⁴

The supreme court interpreted this language as requiring half of the senators to be elected in October 1862 and the other half, including Oates, to be elected in October 1864. The term to which Oates was elected under the old constitution ended when the 1861 convention repealed that constitution. Until the 1864 election, Oates was serving as senator by virtue of the clause in the 1861 Constitution that continued in office all those in office on the date of the new constitution's adoption. Because Oates was not "elected" by the people, but rather "appointed" by the secession convention to his seat in the General Assembly, the constitutional disqualification to be secretary of state did not apply to him.¹⁶⁵

During August 1863, the court decided two more cases brought by persons held by the Confederate military. Neither opinion appears in the Arkansas Reports. *Griffith v. Morrow*¹⁶⁶ clarified the point at which a Confederate army volunteer became subject to military authority. The plaintiff was Captain Griffith¹⁶⁷ of the Confederate Army acting under orders to arrest deserters and stragglers from the 20th Regiment of Arkansas Volunteers, which was then stationed east of the Mississippi.¹⁶⁸ In May 1863, Griffith arrested William Morrow at his home in Pulaski County and detained him as a deserter from the 20th Regiment. Relying no doubt on the supreme court's recent decision in *Ferguson*, Morrow applied to the Pulaski County Circuit Court for a writ of habeas corpus.¹⁶⁹

Resolution of the case turned on whether Morrow had ever actually entered the Confederate Army. The only witness at the habeas hearing was George W. King,¹⁷⁰ who testified that on February 10, 1862, he had put up a notice in McAlmont's Drug Store in Little Rock announcing his intent to form a company of

volunteers for the Confederate Army. Morrow signed a list left by King at the drug store and later joined a group of signees who assembled at St. John's College located just east of the Federal arsenal in what is now McArthur Park. Since no official of the Confederate government was present to swear the volunteers into military service, a justice of the peace administered the oath prescribed by the articles of war. The company then held an election of officers, at which Morrow was an unsuccessful candidate. At a later date the company was officially mustered into the Confederate Army by an enrolling officer of the Confederacy. Morrow was not present at the mustering in, was not sworn by the enrolling officer, and never reported for duty with the company.¹⁷¹

Pulaski County Circuit Judge John J. Clendenin ordered Morrow released from custody, and Griffith appealed. The supreme court affirmed the circuit court's order freeing Morrow. Since there was little precedent, in Arkansas or elsewhere, governing the organization of a company of volunteers, the court analogized the relationship between the Confederate Army and Morrow to a contract between private parties. By signing the list of volunteers, Morrow offered to become a soldier, but King had no authority to accept the offer and enlist Morrow. Until a representative of the Confederacy accepted Morrow's offer and administered the official oath of enlistment, Morrow was free to withdraw his offer and remain a private citizen.¹⁷²

On August 5, 1863, the supreme court issued its final decision from the state capitol in Little Rock. *Sweeten v. Clendenin*¹⁷³ arose when the Confederate enrolling officer for Saline County attempted to conscript George Holt. The conscription act exempted from military service all executive officers of the Confederate state governments,¹⁷⁴ and Holt claimed that his position as a brigadier general in the Arkansas militia was a state executive office that qualified him for the exemption.¹⁷⁵ He applied for a writ of habeas corpus, which was issued by the Saline County Court. Circuit Judge Clendenin refused to quash the writ, and the enrolling officer applied to the supreme court for a writ of mandamus.¹⁷⁶

This time the supreme court sided with the Confederate military and ordered the writ quashed. It conceded that the Arkansas constitution contained a number of provisions that

treated militia officers as executive officers of the state, but it refused to adopt a construction of the conscription act that exempted militia officers from Confederate military service. Under Arkansas law all white males between the ages of eighteen and forty-five were members of the militia,¹⁷⁷ but Confederate law subjected these same individuals to conscription.¹⁷⁸ The high court deemed it absurd to conclude that the Confederate Congress intended by the exemption to leave militia officers at home with no troops to command. While the court declined to decide whether the Congress could constitutionally conscript civil officers of the state, it did note one very important difference between the state's civil officers and its military officers. Without its civil officers, the state would be incapable of exercising the sovereign powers reserved to the states by the Confederate Constitution. But the purposes of an organized militia—repelling invasions and suppressing domestic violence—could easily be accomplished by a Confederate Army that included the Arkansas militia, whether mobilized as a separate force or inducted individually by conscription. "In either case, the state yields to the Confederate government the control of the men and officers composing her militia during the time they are in their service of the government, and in neither case is the sovereign power of the state abridged beyond what was contemplated in the formation of the Confederate government."¹⁷⁹

While the supreme court met in Little Rock during the summer of 1863, the Confederate military's situation in the state continued to deteriorate. On July 4, 1863, a poorly coordinated Confederate attempt to retake Helena was repulsed with heavy losses.¹⁸⁰ The surrender of Vicksburg on the same day isolated Arkansas, Louisiana, and Texas from the rest of the Confederacy. In early August a Union army began advancing westward from Helena toward Little Rock.¹⁸¹ After outflanking the Confederates defending Little Rock, it marched into the capital on September 10, 1863.¹⁸²

As the Union forces approached Little Rock, Governor Flanagin ordered the Confederate state government evacuated to the Hempstead County town of Washington in the southwestern corner of the state. The supreme court moved with the government to Washington.¹⁸³ While Chief Justice English and Justice Fairchild followed the rest of the state government to Washing-

ton, Peyton D. English, the chief justice's teenaged son, transported the court's records by buggy to the temporary state capital.¹⁸⁴ The two justices apparently departed Little Rock in some haste. On October 8, 1863, Fairchild wrote from Washington to Governor Flanagin, who was then in Arkadelphia, complaining that both he and chief justice were "thrust out from home in want of some articles of clothing" and requested the governor's assistance in obtaining permission to purchase clothing on the same basis as military officers.¹⁸⁵

Court records indicate that the court met for the first time in Washington on October 22, 1863, and continued to meet almost daily until November 23, 1863.¹⁸⁶ English and Fairchild attended all the court sessions, but Compton appeared on only two days—October 24 and 26.¹⁸⁷ During that one month period, the court handed down a total of eight opinions. None of the decisions were directly related to the war, and half involved appeals from counties that had fallen to Union forces. All but one of the eight opinions were re-issued after the war.¹⁸⁸

The chief justice was the only court member to appear on the morning of November 26, 1863. The entry for that date reflects the absence of quorum and an adjournment until the December term.¹⁸⁹ A day earlier, on November 25, Fairchild had resigned his seat on the court. Although Fairchild was born and educated in the north, and his support for secession was rumored to be less than enthusiastic,¹⁹⁰ a private letter to Governor Flanagin that accompanied Fairchild's official letter of resignation attributed his departure to personal rather than political reasons.¹⁹¹ In the letter Fairchild explained that his wife and family were alone behind Federal lines near Batesville in Independence County, separated from neighbors by a stream that was often not fordable. Fairchild wanted to visit his family, but Confederate military authorities objected because "to leave here and retire behind the enemy's lines as judge of the Supreme Court would have an injurious moral (sic) effect upon the army and especially upon the preservation and increase of its members."¹⁹² Governor Flanagin had encouraged all civilians to remain at home, and by resigning his seat Fairchild hoped to overcome military objections to his returning to his family.¹⁹³

December 1863 Term of Court

Following Fairchild's resignation, the court could not act until Fairchild was replaced or Compton could be persuaded to attend court. Compton was not present on December 7, 1863 for the start of the December 1863 term, and the lack of a quorum forced English to adjourn court.¹⁹⁴ Compton did attend a one day session of court held on New Year's Day of 1864, at which he and the chief justice considered only administrative matters. Two officers of the court, Attorney General Samuel W. Williams and Supreme Court Clerk Luke E. Barber, remained behind in Little Rock when the state government moved to Washington, and the court acted to replace them. It entered orders appointing A.B. Williams as attorney general *pro tempore* and Peyton D. English as clerk of the court.¹⁹⁵

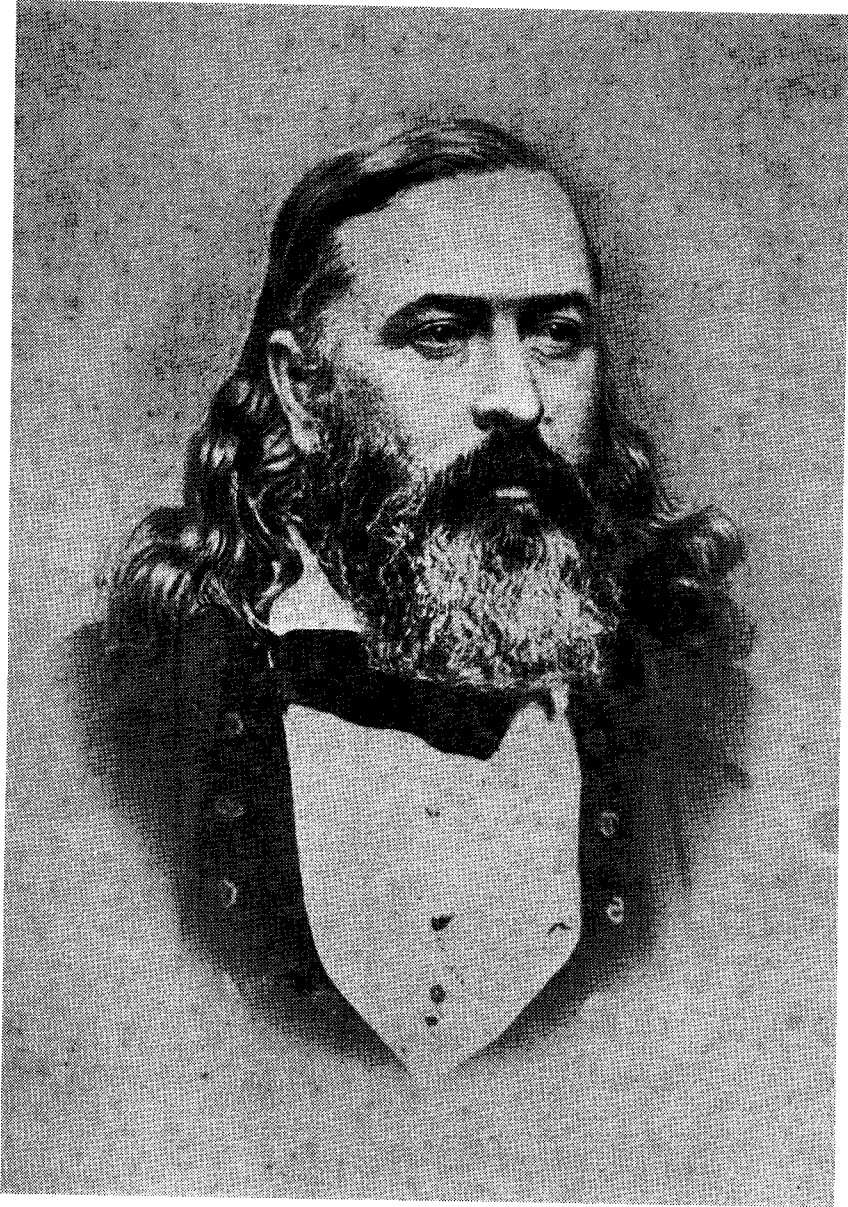
During the first months of 1864 a rival state government was organized in Little Rock under the protection of Union troops. In December 1863, United States President Abraham Lincoln issued an executive proclamation announcing his willingness to recognize the government of any Confederate state in which an oath of loyalty to the Union was taken by citizens equal in number to one-tenth of the votes cast in the 1860 presidential election.¹⁹⁶ The conquest of north Arkansas had unleashed Unionist sentiment in that section of the state, and delegates purporting to represent twenty-three of the state's fifty-seven counties assembled in Little Rock in January 1864 and drafted a new constitution.¹⁹⁷ An election was held in Union-occupied Arkansas for three days beginning on March 14, 1864. Those voting approved the proposed constitution 12,426 to 222 and elected a new state government.¹⁹⁸ Since 54,000 Arkansans had voted in the 1860 presidential election,¹⁹⁹ the vote easily satisfied Lincoln's ten percent threshold for presidential recognition. For the remainder of the war Arkansas had two state governments—a Confederate state government at Washington and a Union state government at Little Rock. The Little Rock government included a three-member supreme court that met in the supreme court chambers of the state capitol. Unlike its Confederate counterpart, the Union state supreme court lacked a backlog of appeals and issued no opinions until after the war ended.²⁰⁰

The one day administrative session on January 1, 1864, was to be the only day of the December 1863 term that the Confederate supreme court met. Following the session Compton returned to his plantation at Princeton where he remained throughout the spring of 1864. On March 12, 1864, he wrote to Governor Flanagin to offer his views on the proposed appointment of a probate judge.²⁰¹ In that letter Compton announced his intent to return to Washington in the near future. An entry in the court's records indicates that on April 1, 1864, the court adjourned until the first day of the June term.²⁰² It seems likely that English and Compton planned to meet on April 1, but were prevented from doing so by military events.

In March 1864 a Union army of 8,500 men marched southwest out of Little Rock.²⁰³ Its goal was Shreveport, Louisiana, where plans called for it to link up with a second army moving north from Louisiana.²⁰⁴ By early April the Arkansas column seemed poised to attack Washington, and this development would have discouraged the court from meeting on that date.²⁰⁵ Fortunately, for the Confederate state government-in-exile, the Union troops never reached Washington. Instead, they turned east and occupied Camden in south central Arkansas before finally retreating north to Little Rock in late April and early May.²⁰⁶

During the south Arkansas campaign, Justice Compton remained at his plantation in Princeton, which lay along the Union army's return route to Little Rock. On April 28, 1864, a Federal cavalry force swept through Princeton²⁰⁷ and almost captured Compton. Compton managed to escape by hiding for several days in the attic of the town's only hotel.²⁰⁸

Chief Justice English's whereabouts during the spring of 1864 are unclear. He was still in Washington in early March 1864.²⁰⁹ However, the entry in the court's judgment record on April 1, 1864, does not indicate, as it normally did, that the chief justice was present in Washington to adjourn court.²¹⁰ It is possible that as a noncombatant English was allowed to visit his family in Little Rock in the spring of 1864.²¹¹ On May 9, 1864, a "Judge English" intervened with federal authorities in Little Rock to secure the release of four imprisoned women,²¹² but the intervenor may have been the chief justice's brother, Noah D. English, who was probate judge of Jefferson County.²¹³



Associate Justice Albert Pike of the Arkansas Supreme Court. (Photograph courtesy of the J.N. Heiskell Collection, University of Arkansas at Little Rock Archives.)

June 1864 Term of Court

On June 8, 1864, Governor Flanagin finally named Albert Pike as Fairchild's replacement on the court.²¹⁴ Pike was one of the more colorful characters to grace the Arkansas political stage during the nineteenth century. He was born in Boston, Massachusetts, in 1809. At an early age his parents moved to western Massachusetts where Pike received a public school education that was later supplemented with private tutoring by his cousin, who taught at a preparatory school in Newburyport. Pike qualified for admission to Harvard, but lacked the funds to enroll. In the spring of 1831 he went west with two companions eventually reaching St. Louis, where the three joined an expedition hauling trade goods from Independence, Missouri, to Santa Fe, then located in Mexico. After working as a clerk for several months in Santa Fe, Pike joined a group of frontiersmen heading east to trap beaver in what is now the Texas panhandle. The expedition had difficulty finding fresh water, let alone beaver, in the semiarid region, and eventually split up after a disagreement over exactly where they were. Pike and four companions walked from west to east across the present state of Oklahoma and reached the frontier town of Fort Smith on the western edge of the Arkansas Territory in December 1832. By March 1833 Pike was teaching primary school near Van Buren, and later the same year he opened a primary school at Little Piney in what is now Johnson County.²¹⁵

Arkansas politics during the 1830's pitted Jacksonian Democrats, led by the Conway-Johnson "family," against Whigs led by Robert Crittenden and his associates. Soon after arriving in Arkansas, Pike began publishing poetry and political articles in the *Advocate*, the Whig newspaper in Little Rock. The young writer attracted the notice of Whig leaders, and with Crittenden's backing, he was offered a job with the *Advocate*. Pike moved to Little Rock late in 1833 and became editor of the newspaper. He studied law and was admitted to the bar in August 1834. Pike purchased the *Advocate* from its owner in 1835, and for the next two years he was simultaneously a lawyer and newspaper publisher.²¹⁶ In 1838 his edited version of the statutes passed by the first General Assembly was approved as law by the second General Assembly.²¹⁷ When the United States declared war on

Mexico in 1846, Pike raised and served as captain of a company of calvary that participated in the war as a part of the Arkansas Volunteer Calvary regiment. Pike was admitted to practice before the United States Supreme Court in 1849 and spent much of the 1850s developing a national law practice while maintaining his Arkansas ties. In addition to arguing cases before the state and federal courts, Pike was retained to press treaty claims before Congress on behalf of Creek and Choctaw tribes. For a brief time during the 1850s Pike was also a leader of the American Party, a nativistic third party political movement that achieved brief national stature before disintegrating over the issue of slavery.²¹⁸

After Arkansas seceded, President Davis named Pike as a Confederate commissioner to the Indian tribes in the territory west of Arkansas. Between July and October 1861, acting almost singlehandedly and without official sanction, Pike negotiated treaties which made each of the various tribes allies of the Confederacy.²¹⁹ When Pike appeared in Richmond seeking ratification of the treaties, the Confederate government wisely overlooked the fact that Pike had exceeded his authority and rewarded his initiative by naming him a brigadier general and assigning him to command the troops raised from among the tribes.²²⁰ At the battle of Pea Ridge, in March 1862, Pike led a group of Native American troops who fought with mixed success as light cavalry.²²¹ Shortly after the battle Pike became involved in a public war of words with Major General Thomas C. Hindman, the commander of Confederate troops in Arkansas and the Indian Territory, which culminated in Pike's resignation and arrest for treason.²²² The treason charges were eventually dropped, and Pike retired to his farm in Hempstead County. There he labored on Masonic ritual and philosophy until Flanagin summoned him to Washington to join the supreme court.²²³

Pike's appointment enabled the supreme court to meet for the first time since January 1, 1864. English and Pike heard oral arguments in a number of cases beginning June 20, 1864.²²⁴ The *Washington Telegraph* editorialized on the importance of the court to the Confederate cause:

We rejoice to see this Court at work. Our State tribunals should not be allowed to rust from disuse. In a short time our people might lose proper respect for its laws and authorities, and peace might find us in a state of anarchy. If the bogus government [in Little Rock] is kept before the people in active operation, whilst ours falls into obscurity, we cannot be astonished that ignorant people may consider our government lost, and give in their allegiance to the other.²²⁵

An immediate problem faced by the court was getting attorneys to appear in Washington for oral argument of cases probably docketed before the court left Little Rock. On July 18, 1864, the court ordered three attorneys—A.H. Garland, A.B. Williams, and M.T. Holt—to appear and show cause why they should not be held in contempt of court for failing to appear for argument in *Rogers v. Swink*.²²⁶ The matter was dropped after the three appeared before the court on August 1, 1864, and persuaded it that they were not guilty of intentional contempt.²²⁷ Since the attorneys cited were politically connected—Garland was a Confederate congressman and Williams was acting attorney general—the court may have intended its action as a warning to those attorneys who failed to see any purpose in a trip to Washington.

Justice Compton did not join his colleagues until the second week of July,²²⁸ when the court handed down eight opinions. According to an unsigned and undated marginal notation in the court's judgment record, these decisions were later deemed "null and void" since they were rendered after March 16, 1864, the date that Union supporters in those parts of the state under Federal control approved a new constitution.²²⁹ Seven of the eight "null and void" decisions issued on July 8, 1864 were later re-docketed and adopted by the post-war supreme court organized under the Union Constitution of 1864.²³⁰ These resurrected decisions dealt with legal disputes that had been pending since before the war.

The only July 8, 1864 decision not later reissued was *James Wilde, Jr. & Co. v. Hart*.²³¹ The case was a debt collection suit commenced prior to the war by a New York firm against a Pulaski County merchant. On May 30, 1861, the secession convention adopted a sequestration ordinance prohibiting the payment of any debts to enemy aliens and freezing all lawsuits by enemy



Union Troops in Front of State Capitol about 1864. (Photograph courtesy of University of Arkansas at Little Rock Archives.)

aliens for the collection of debts.²³² Following secession, the defendant refused to pay the debt on the grounds that the plaintiffs were enemy aliens. The Arkansas attorneys representing the New York firm probably had difficulty communicating with their New York client once hostilities began, because they asked the circuit court for a continuance. The Pulaski County Circuit Court refused to continue the case and dismissed the lawsuit when the plaintiff's attorneys declined to proceed further. The plaintiff's attorneys appealed the dismissal, and the supreme court ruled that the Arkansas sequestration ordinance was superseded by an August 30, 1861 act of the Confederate Congress, which confiscated all debts owed to enemy aliens.²³³ Rather than dismiss the action, the lower court should have continued the case and allowed the Confederate States receiver the opportunity to take over the prosecution of the suit. The

court therefore reversed and remanded the case to the circuit court for further proceedings. The opinion has a surrealistic air about it since, by July 1864, both the Pulaski County Circuit Court and the debtor were in Union-occupied Little Rock, well beyond the reach of the receiver for the Confederate States.

In August 1864 the court handed down a second decision that was not reissued after the war ended. The prosecuting attorney for the Fifth Judicial Circuit, Pleasant Jordan, died in June 1863. Little Rock attorney Samuel W. Williams was named to replace him.²³⁴ As prosecuting attorney for the judicial circuit in which Little Rock was located, Williams became the ex-officio attorney general for the state.²³⁵ Williams stayed behind in Little Rock when the city fell to federal forces, and on January 1, 1864, the court was forced to appoint a temporary attorney general to represent the state.²³⁶ In the spring of 1864 Williams took the oath of allegiance to the United States and ran unsuccessfully for a circuit judgeship in the loyalist state government in Little Rock.²³⁷

On July 9, 1864, the acting attorney general asked the supreme court to issue a writ of *quo warranto* to Williams.²³⁸ A writ of *quo warranto* was the traditional way of testing the right of a person to hold a particular office, franchise, or privilege.²³⁹ If the supreme court granted the writ, Williams would be required to appear before it and show why (literally, "by what warrant") he was entitled to hold the office of attorney general.

The two hundred page opinion in *State v. Williams*²⁴⁰ was authored by Justice Pike and delivered on August 8, 1864. At the heart of the case was the conflict between the duty that Williams owed his country and the duty he owed his state. Williams had been born a citizen of the United States and had not directly participated in Arkansas' decision to secede from the Union.²⁴¹ The question posed by the case was how Williams (and similarly situated Arkansans) could commit treason against the state by taking the oath of allegiance to the United States.²⁴²

Pike's solution to this quandary was based on the "compact" theory championed by South Carolina during the nullification crisis of the 1830s.²⁴³ The United States Constitution, according to Pike, was a compact between the states, not between the people of those states. From this premise, Pike reasoned that "it is only through his State, and as a citizen of it, that anyone owes

allegiance to the nation.”²⁴⁴ When Arkansas, acting through the elected representatives of its citizens, voted to withdraw from the Union, that decision was binding on all citizens of the state whether or not they agreed with the decision. Consequently, at the time of secession each Arkansan ceased to be a citizen or owe allegiance to the United States, but he or she continued to be a citizen of and owe allegiance to the state of Arkansas.

In the last six pages of his two hundred page opinion, Pike finally addressed the facts of the particular case before the court. Williams was never referred to by name—he was simply “the party against whom the writ of *quo warranto* is now demanded.”²⁴⁵ The information filed by the state alleged that Williams had taken the oath of allegiance to the United States, recognized the state government organized in Little Rock, and offered to serve as a circuit judge under that government. If true, these acts constituted high treason against the state of Arkansas and an abandonment of any office of the state. The court further noted that Williams resided in Pulaski County, which was then in enemy possession. Since the court could not issue a summons to Williams to appear before it and answer the charges in the information, it ordered the writ of *quo warranto* to be delivered to the sheriff of Hempstead County and notice published in the *Washington Telegraph* for four successive weeks. If Williams failed to appear before the court within forty days from the date of first publication, he would be ousted from the offices of prosecuting attorney of the Fifth Judicial District and attorney general of the state.²⁴⁶

While the supreme court was deciding cases during the summer of 1864, it became embroiled in its most direct confrontation with the Confederate military. The controversy involved Elijah Ferguson, the same Hempstead County conscription officer whose attempt to draft a plantation owner had produced *Ferguson v. Green*.²⁴⁷ When the court moved from Little Rock to Washington in the fall of 1863, its longtime clerk, Luke E. Barber,²⁴⁸ remained in Little Rock. Peyton D. English, the chief justice’s son and deputy clerk of supreme court, accompanied the court to Washington and served as acting clerk during the fall of 1863. When the court learned in January 1864 that Barber had taken the oath of allegiance to the United States, it appointed the seventeen year old English as clerk even though the court’s rules

required the clerk to be twenty-one years of age. Since the position of supreme court clerk was required for the service of the state, its holder was exempt from military service.²⁴⁹

According to a June 29, 1864, letter from the English and Pike to Governor Flanagin, "one Elijah Ferguson, originally a Provost Marshall appointed by Major General Hindman and who . . . had afterwards been made, by what legal authority is unknown to the court, an Enrolling Officer for the county of Hempstead, officiously undertook to conscript the clerk of the court, taking upon himself to decide that the appointment made by the court was null and void because the appointee was not twenty-one years of age."²⁵⁰ The justices' letter insisted that the court was the sole judge of the qualifications of its officers and raised the possibility that if Ferguson persisted in determining the clerk's qualification for office, the court might officially consider whether Ferguson was legally in possession of his claimed office.²⁵¹ On July 1, 1864, Governor Flanagin forwarded the letter to Major General E. Kirby Smith, commander of Confederate forces west of the Mississippi. He noted in his cover letter that "it is conceived to be the duty of the executive to ask and *insist* upon those rights of the state which she undoubtedly possesses."²⁵²

The resolution of the dispute is unclear. The younger English does not appear on Confederate service lists. According to a post-war biographical sketch, he joined the staff of General James Fagan sometime in 1864.²⁵³ He was still serving as clerk of the court as late as January 6, 1865,²⁵⁴ and it is possible that he divided his time between military and judicial duties during the final months of the war.

During August and September 1864 English and Pike issued two "advisory" opinions, one to the governor and a second to the General Assembly. Although neither opinion was recorded in the court's official records, they were probably the most significant actions taken by the court during the period it sat in Washington.

The first opinion followed Governor Flanagin's issuance, on July 25, 1864, of a proclamation calling for a statewide general election to be held on the first Monday in October as required by the constitution.²⁵⁵ Almost immediately an editorial appeared in the *Washington Telegraph* questioning whether, with over

half the state occupied by Union forces, returns could be obtained from enough counties to ensure a quorum in either house of the next General Assembly. The newspaper proposed instead that the governor call a special session of the existing legislature to adopt election laws more attuned to the wartime conditions then prevailing in the state.²⁵⁶

This led Flanagan to present two questions to the supreme court. First, could the election of the General Assembly set by the constitution for the first Monday in October be postponed until it was practicable to hold an election? Second, if the legislature did not meet in regular session on the first Monday in November, as required by the constitution, could it be convened at a later date?²⁵⁷ Despite a well established injunction against the court issuing advisory opinions, English and Pike did just that. They furnished the governor with a written opinion answering both his questions in the affirmative.²⁵⁸

On August 9, 1864, Flanagan issued a call for a special session of the General Assembly elected in 1862 to convene in Washington on September 22, 1864.²⁵⁹ When less than half the senators and house members appeared, those legislators in attendance formally asked the supreme court whether they could proceed to hold a session of the General Assembly despite the absence of a quorum in either house.²⁶⁰

English and Pike agreed that those legislators present could organize and convene the legislative business. The two justices started from the premise that the public enemy of the state—i.e., the United States—could not, by conquering and occupying a part of the state, prevent the General Assembly from organizing. Although those counties under Union occupation remained *de jure* part of the state, the legislature could determine that they were now *de facto* under another government. "It would declare, not that the people of those counties should no longer be entitled to be represented, but that they had, by their adherence to the public enemy, disqualified and disenabled themselves to be so The counties being no longer entitled to representation, the number of members in each House would be to that extent lessened."²⁶¹ In some cases, however, members from counties under occupation had managed to slip through Union lines and appear in Washington for the special session. These members, the court declared, should be recognized because no

law denied representation to a conquered county whose people were still loyal to the state. However, if no legislators from a county appeared, the presumption was that the county ceased to be a part of the state, either by force or its own volition.²⁶² In a final ironic comment, the court pointed out that its position was consistent with that of the United States government, which denied the right of the southern states to secede but excluded these states in determining whether a quorum was present in either house of Congress or in ascertaining whether a candidate for president had received a majority of the electoral votes.²⁶³

After receiving the court's written response, the rump General Assembly met for several days and enacted emergency measures to deal with the crisis facing the state.²⁶⁴ Several acts addressed the dysfunctional justice system. The legislature came up with a practical solution to the loss of the state penitentiary in Little Rock. It abolished imprisonment as a form of punishment and divided all criminal offense into two categories—those punishable by death and those punishable by whipping.²⁶⁵ The legislature also passed a resolution declaring that the rights of the people could only be guaranteed if the supreme and inferior courts of the state met at the legally appointed times.²⁶⁶

December 1864 Term of Court

The final term of the Confederate state supreme court began on Monday, December 5, 1864, with all three justices present.²⁶⁷ After meeting for one day, the court adjourned until January 6, 1865. On that date it entered an order finding that Samuel W. Williams had failed to respond to the writ of *quo warranto* issued the preceding August and ousting Williams as state attorney general.²⁶⁸ The court also delivered its final two opinions.²⁶⁹

Only one of the decisions was war-related. The issue in *Rector v. State*,²⁷⁰ another unpublished opinion, was whether a Confederate officer's obedience to orders constituted a defense to a state criminal prosecution. Early in 1862, the General Assembly had prohibited the distilling of any type of spirituous liquor for the duration of the war.²⁷¹ The act was designed to prevent the conversion of grain needed for food and fodder into whiskey as well as to discourage the "demoralizing effects" of liquor traffic on soldiers.²⁷² On March 4, 1864, Captain Thom-

as Rector²⁷³ was indicted by a Sevier County grand jury for distilling spirituous liquor.

At his trial in August 1864 Rector admitted distilling liquor, but offered two documents in his defense. The first was a purported copy of an official order dated January 31, 1863, from the Subsistence Office, Headquarters, Trans-Mississippi Department of the Confederate army, to Major C.P. King at Arkadelphia, Arkansas.²⁷⁴ The order directed King to procure whiskey at five dollars per gallon from stills in the vicinity of military posts.²⁷⁵ The second document was a communication from the same office dated March 4, 1863, and directed to Captain Rector. It authorized him to furnish corn at two dollars a bushel to persons who agreed to furnish whiskey at five dollars per gallon and deliver one and one half gallons of whiskey for each bushel of corn provided.²⁷⁶ The trial court instructed the jury that the defendant had no authority to set aside the laws of the state even if he was acting pursuant to orders, and the jury convicted Rector.

The supreme court ruled that the Confederate army had authority to determine whether it needed whiskey for medicinal purposes and that any medical purveyor or commissary acting "under any order emanating from competent military authority . . . cannot be punished criminally, under a statute of the State, for discharging an official duty imposed upon him."²⁷⁷ Consequently, the trial court erred when it "assumed to decide whiskey was not necessary for the support of the army, and declared the law to be that if the defendant made whiskey under the order of a superior officer, he was nevertheless guilty of a violation of a Statute of the State."²⁷⁸

Unfortunately for Rector the supreme court refused to accept the written orders introduced by the defense. The first communication was directed to a Major King. Captain Rector did not explain how he obtained possession of the communication or claim that Major King delegated him the authority to execute the order. The second communication was directed to Captain Rector, but was issued the same day Rector was indicted and afforded no protection for actions taken prior to that date. The court nevertheless reversed Rector's conviction because the state failed to show that the whiskey was distilled in Sevier County as alleged in the indictment. Rector's testimony did not cure this

omission. He admitted distilling the whiskey, but his admission failed to state where the whiskey was distilled.²⁷⁹

The End of the War

Since the war in the state had gone better for Confederate forces during 1864 than in earlier years, the surrender of southern armies east of the Mississippi in April 1865 came as a shock to many Arkansans. General E. Kirby Smith did not surrender troops in the Trans-Mississippi Department that included Arkansas until June 2, 1865.²⁸⁰ By that date most individual commanders in the state had already capitulated.²⁸¹

The Confederate state supreme court, like the government of which it was a part, ceased to exist sometime in the spring of 1865. The last entry in the court's judgment book is an order dated January 6, 1865. It appointed Uriah M. Rose as reporter and directed Rose to publish abstracts of the court's opinions in some newspaper selected by him.²⁸² Rose immediately began publishing opinions at a rate of several per week in the *Washington Telegraph*, the only newspaper still in circulation in Confederate-held Arkansas.²⁸³ The court's last opinion appeared in the newspaper on April 19, 1865, ten days after Confederate General Robert E. Lee surrendered the Army of Northern Virginia at Appomattox Courthouse, Virginia.²⁸⁴

Conclusion

Contrary to the impression conveyed by the Arkansas Reports, the supreme court was able to function with surprising normality until the final days of the Confederate state government. The number of appeals heard by the court did drop dramatically during the four years of war, but this decline was attributable more to the collapse of the lower court system than to any dereliction of duty on the part of the justices. During the war years, the court was able to meet in regular session every scheduled term except the June 1862 and December 1863 terms.²⁸⁵ The June 1862 term was probably adjourned because Federal forces threatened the capital, and the governor's reaction to the invasion left the location of the seat of government unclear. The term was not a total loss because the court did meet in August 1862 to hear *Danley and Johnson, ex parte*, one of its more significant wartime decisions. The only wartime term

during which the court failed to issue any opinions was December 1863, but this lapse was caused by Justice Fairchild's resignation coupled possibly with the spring 1864 Union invasion of south Arkansas. The court's response to the fall of Little Rock was particularly notable. When the approach of a Federal army forced the evacuation of the state capital, the court moved its records to Washington and within six weeks was issuing opinions from a county courthouse in the temporary seat of government.

The four wartime justices deserve varying degrees of credit for the court's ability to continue functioning throughout the war. Elbert English was clearly the most conscientious of the wartime justices and was primarily responsible for keeping the court operating during the war years. With one exception, the chief justice was present for each session of court from January 1861 to January 1865.²⁸⁶ While ably discharging the administrative duties of his office, he turned out over a third of the opinions issued during the war years.

By contrast Freeman Compton's attendance record was spotty. The court's records indicate that Compton was absent one or more days during most terms of court held during the war. The December 1862 term was the exception, when he managed to attend all sessions of court.²⁸⁷ He did not appear at all in Little Rock during the summer of 1863 and attended only one session of court at Washington during the summer of 1864.²⁸⁸ The seven-month period of judicial inaction that followed the resignation of Justice Fairchild was largely attributable to Compton's reluctance to travel from Princeton to Washington. Compton's cavalier attitude toward his judicial duties was summed up by a statement he made in his February 1864 letter to Governor Flanagin:

So soon as I can get through some necessary arrangements I will be at Washington. Don't know how soon I'll be compelled to leave court and remain away. I know not how long. I find it difficult to get off. Make my compliments to Judge English. I say, never mind the court.²⁸⁹

Hulbert Fairchild's performance on the court falls somewhere between that of English and Compton. Fairchild missed a number of court sessions during November and December 1861 and again during November and December 1862.²⁹⁰ Many of the cases heard during the December 1861 terms were appeals

from decisions made by Fairchild as chancellor, and Fairchild was forced to recuse from the cases. Despite these absences, Fairchild managed to write more opinions than either English or Compton between May 1861 and his resignation in November 1863. The following table shows the output of the three jurists during that period:

	May 1861	Dec. 1861	June 1862	Dec. 1862	June 1863	Total
English	7	18	0	5	11	41
Fairchild	11	27	1	7	5	51
Compton	0	11	0	8	0	19

The decline in Fairchild's output during his final term on the court may reflect his emotional state. The letters Fairchild wrote from Washington reveal a man demoralized by the privations of exile and separation from his family. The fact that he left the state for the north shortly after resigning in November 1863, suggests that he simply gave up on Arkansas and the Confederacy.²⁹¹

When Albert Pike joined the court in June 1864, he brought to the court both his skills as a writer and his enthusiasm for the Confederate cause. Without Pike's assistance, it would have been difficult for English to continue the court's work during the last year of the war. Pike's judicial output during his brief tenure on the court was impressive. The written opinions issued by the court during its June and December 1864 terms total 336 handwritten pages of which Pike was responsible for 295.²⁹² These opinions do not include the unofficial opinion issued by English and Pike to the General Assembly in September 1864, which may also have been authored by Pike.

Because the court decided relatively few war-related cases, it is difficult to characterize the court's reaction to the war. The court did seem slow to grasp the extraordinary challenges to the state's judicial system posed by the war. When the court invalidated a legislative attempt to suspend all judicial proceedings throughout the state in *Burt v. Williams*, Justice Fairchild asserted that the war increased rather than reduced the need for constitutional vigilance:

In orderly and peaceful times the state might better trust to laws without constitutional safeguards; but in periods of turbulence, when passion and feeling usurp dominion over reason, infractions upon the constitution should be closely watched, [and] must be firmly restrained.²⁹³

A year later, after the flight of the state government to Washington, the court seemed more amenable to bending traditional constitutional norms. It issued advisory opinions to the governor and legislature, and its solution to the problem of assembling a legislative quorum was a creative accommodation of the constitution to the fact that a majority of the state's counties were under the control of the Union army.

This change in the court's attitude may have been the result of the deteriorating military fortunes of the Confederacy. In June 1863, when Fairchild wrote the *Burt* opinion, Confederate forces still held the state capitol and the southern half of the state, and the Army of Northern Virginia was marching northward toward Gettysburg. By the summer of 1864, Confederate Arkansas had shrunk to a few counties in the extreme southwest corner of the state, and Confederate armies east of the Mississippi were on the defensive. The court's changing perspective on the importance of adhering to constitutional norms may also reflect the replacement of Fairchild, whose opinions indicate a jurist firmly wedded to precedent, with Pike, whose background as a newspaper publisher, politician, and soldier, may have inclined him toward pragmatism.

The court's attitude toward the Confederate military also seems to also have undergone a change as the war progressed. In the summer of 1862, the court did not challenge General Hindman's attempt to suspend the writ of habeas corpus, but it is not clear whether this was because the court was reluctant to take on the Confederate military during a time of crisis or because the issue was quickly resolved through political rather than judicial channels. There is *obiter dictum* in the court's 1864 opinion in *State v. Williams*,²⁹⁴ suggesting that the court was sensitive to the charge that it avoided a confrontation with Hindman over the habeas corpus issue. After noting Hindman's claim that no state court ever challenged his attempt to suspend the writ, the court in *Williams* said:

It is not for us to vindicate, whether from aspersion or just censure, the other authorities of the State or the subordinate courts of justice; but, simply saying that this court, at least, was never suspended to inquire whether, not in obedience to military usurpation, but in deference to former decisions, its magistrates had ceased to exercise any of their functions²⁹⁵

By the spring of 1863, at least, the court was not shy about asserting state court jurisdiction over the Confederate military. On three separate occasions between April and August 1863 the court undertook to decide whether Arkansans were subject to military service with the Confederate army. There was no precedent in the pre-war decisions of the court for a similar assertion of state authority over the United States military. The court did not consider any habeas petitions seeking release from military duty after August 1863, but this was probably because in February 1864 the Confederate Congress delegated to the commander of the Trans-Mississippi Department the power to suspend the writ.²⁹⁶

As the war progressed, the conflicts between the justices and the Confederate military became much more personal. In a December 1863 letter to Governor Flanagin, Fairchild complained bitterly about military attempts to prevent his visiting his family behind Union lines and accused the military of treating him as little more than a conscript.²⁹⁷ Friction over the respective roles of the judicial and military authorities intensified in the summer of 1864 following the attempt by Confederate authorities to conscript Peyton D. English. Strained relations with the military did not, however, prevent the court from recognizing in *Rector v. State*²⁹⁸ that obedience to military orders was a defense to a state criminal prosecution.

One unanswered question is why some wartime opinions of the court were never published in the Arkansas Reports. When the supreme court decided during the December 1866 term to redocket and reissue the opinions of the wartime court, it chose not to include eleven opinions that appear in the handwritten records of the court. These eleven opinions and the date on which each opinion was delivered are set out below:

<i>Style and date of case</i>	<i>Location in handwritten records</i>
Ex parte Robinson August 13, 1862	Opinion Book K at 440
Ferguson v. Green April 16, 1863	Opinion Book K at 483
Cunningham v. Clendenin June 17, 1863	Opinion Book K at 517
Griffith v. Morrow August 5, 1863	Opinion Book K at 519
Sweeten v. Clendenin August 5, 1863	Opinion Book K at 523
Quillin v. Sibby November 2, 1863	Washington Opinion Book at 45
Wilde & Co. v. Hart July 8, 1864	Washington Opinion Book at 106
State v. Williams August 8, 1864	Washington Opinion Book at 234
Rogers v. Swink August 27, 1864	Washington Opinion Book at 421
Rector v. State January 6, 1865	Washington Opinion Book at 426
Trammel's Heirs v. Harris January 6, 1865	Washington Opinion Book at 437

Court records are sketchy as to why these eleven opinions were not reissued after the war. The clerk's docket contains the following entry dated January 19, 1867: "Motion by E. H. English, Esq., that the opinions of the court be certified by the clerk to the Reporter." If this entry refers to the wartime opinions of the court, then the former chief justice was instrumental in getting the opinions of his court published, and he may have played a role in the selection of opinions for publication in the reporter.

Two of the "lost" opinions—*Quillin v. Sibby* and *Rogers v. Swink*—were disputes over slaves. *Ex parte Robinson* involved a pre-war statute requiring free blacks to leave the state. These

three opinions were probably not reissued after the war because the post-war court saw little need for precedent involving the law of slavery.

Most of the remaining omitted opinions were directly related to the war. *Ferguson v. Green*,²⁹⁹ *Griffith v. Morrow*,³⁰⁰ and *Sweeten v. Clendenin*³⁰¹ were petitions for writs of habeas corpus by persons seeking release from the Confederate military. *Rector v. State*³⁰² granted a Confederate officer limited immunity from the state's criminal statutes. Like the slave cases, these opinions may have been struck from the list of resurrected decisions because their precedential value was thought to be limited. The post-war court may have also deemed it prudent not to reissue opinions dealing directly with the military forces of the Confederate States.

A desire to avoid war-related cases may also explain why the post-war court did not redocket and reissue the 1864 opinion in *Wilde & Co. v. Hart*.³⁰³ That opinion held that the receiver of the Confederate States should be afforded the opportunity to take over the prosecution of a suit seeking to collect a debt owed an enemy alien. The *Wilde* opinion may have also been omitted because the case reached the high court a second time during the same December 1866 term at which the court was deciding which opinions of the wartime Confederate court should be reissued.³⁰⁴ In its second *Wilde* opinion, the court noted that in addition to interposing the enemy alien act, the debtor had alleged that the debt had been paid. By declining to respond to the claim of payment, and instead moving for a continuance, the creditor had confessed the debtor's plea of payment. The second *Wilde* opinion effectively mooted the first.

The omission most easily explained is that of *State v. Williams*.³⁰⁵ The opinion devoted far more space to justifying secession than was necessary to the result reached by the court. Many of the political sentiments expressed in the opinion were simply too incendiary for republication in the Arkansas Reports only eighteen months after the end of the war. Ironically, the *Williams* opinion was later quasi-resurrected during the Reconstruction era by a court dominated by justices who had served in the Union army. In deciding that it did have original jurisdiction to issue a writ of *quo warranto* to a public official, the court in *Williams* overturned a long line of pre-war decisions. When the

Reconstruction-era supreme court decided that it too had the power to oust state officials, it cited the unpublished *Williams* decision as support for its position despite the opinion's unofficial status.³⁰⁶

It is less clear why *Trammel's Heirs v. Harris*³⁰⁷ and *Cunningham v. Clendenin* were not reissued after the war. *Trammel's Heirs* was an ejectment action to recover a tract of land in Ashley County which had been acquired at an execution sale in 1857. *Cunningham* involved an attempt by the register of the land office in Fayetteville to recover salary for a period after his office was abolished by the legislature. Since neither case was related to the war or slavery, the reasons discussed above would not explain its omission from the list of reissued cases.

A contributing factor to the exclusion of the eleven opinions from the reissued list may have been judicial efficiency. If the decisions issued by the Confederate state supreme court after the adoption of the Constitution of 1864 were indeed "null and void," then the parties to those decisions might have filed new appeals with the court. To foreclose new appeals that would add to its workload, the post-war court may have decided to adopt the decisions of the Confederate court. Decisions involving the slavery or the Confederate military were clearly moot by December 1866. If the court chose not to redocket and reissue these decisions, the parties would not file new appeals.

Epilogue

Chief Justice English was still in Washington as late as March 10, 1865,³⁰⁸ and he probably remained in the temporary capital until the state government collapsed. After the war he returned to Little Rock and the practice of law. With the support of Unionist Governor Isaac Murphy, English received a presidential pardon in 1867,³⁰⁹ but was disenfranchised a second time when a new, congressionally-mandated state constitution was adopted in 1868.³¹⁰ English nevertheless remained an influential leader of the Democrat-Conservative coalition that opposed the Republicans who controlled state government from 1868 to 1874. In 1871 the Arkansas General Assembly approved a bill restoring English's political rights.³¹¹ His rehabilitation was completed in 1873 when he served as counsel for Republican Governor Elisha Baxter during the legal skirmishing that preceded the

Brooks-Baxter War. After that affair ended in Baxter's favor and the legislature impeached the Republican chief justice of the supreme court, Baxter appointed English as acting chief justice.³¹² At an election that coincided with the adoption of the Constitution of 1874, English was elected on the Democratic ticket to the supreme court. He drew a six year term and was re-elected to an eight year term in 1880. English died on September 1, 1884, in Asheville, North Carolina, where he went seeking relief from the summer heat. He had served as chief justice of Arkansas for over twenty years and held the office under the Constitutions of 1836, 1861, 1868, and 1874.³¹³ According to his obituary, "No one was ever so closely or conspicuously and for so long a period identified with the judiciary of the state."³¹⁴

Since there is no evidence that Freeman Compton ever returned to Washington after the January 6, 1865 session, he was probably at his plantation in Dallas County when the war ended. In the August 1866 election in which former Confederates were allowed to vote, Compton was again elected to the supreme court, but lost his seat in 1868 when the Constitution of 1868 went into effect.³¹⁵ He served with English as co-counsel for Governor Baxter during the Brooks-Baxter affair and joined English on the bench at the conclusion of that war. When the Democrats returned to power in the October 1874 election, Compton was not a candidate. During his later years he practiced law in Little Rock. His health declined after he suffered a bout of influenza in December 1891, and he succumbed to Bright's disease on May 28, 1893. Like his longtime colleague English, he served as supreme court justice under four of the state's five constitutions.³¹⁶

After leaving the court in November 1863, Hulbert Fairchild returned to his farm in Independence County. He left Arkansas in 1864, made his way to St. Louis, and attempted to start a law practice. The Missouri courts refused him a license because of his Confederate associations. He spent the final months of the war touring Europe. After the war ended he moved to Memphis. In the winter of 1866, he started toward Batesville on a business trip and got as far as Jacksonport, on the White River. He died there on February 3, 1866.³¹⁷

Sometime during the winter of 1864-65 Albert Pike moved his family to Lafayette County to escape the food shortages in

Washington. When the war ended in May 1865, Pike travelled to New York, where he applied for a presidential pardon. Fearing arrest he briefly moved to Canada, but on August 30, 1865, President Andrew Johnson signed an order allowing Pike to return to the United States. Pike moved to Memphis in early 1866 and for the next two years was part owner and editor of the *Memphis Appeal*. He devoted his editorial columns to defending secession and advocating resistance to Republican efforts to reconstruct the south.³¹⁸ During February and March 1866 he published his 1864 opinion in *State v. Williams* in installments.³¹⁹ Despite his lack of "reconstruction" he finally received a presidential pardon in early 1867.³²⁰ He moved to Washington, D.C. in 1868, where he formed a law partnership with Robert W. Johnson, the brother of Henry Rector's opponent in the 1860 gubernatorial campaign. He remained active in masonic affairs and published several books on masonic philosophy. He died at Alexandria, Virginia, on April 2, 1891.³²¹

ENDNOTES

1. Recent books on the Civil War in Arkansas include *Rugged and Sublime: The Civil War in Arkansas* (Mark K. Christ, ed., Fayetteville: University of Arkansas Press, 1994), 38; Carl Moneyhon, *The Impact of the Civil War and Reconstruction on Arkansas: Persistence in the Midst of Ruin* (Baton Rouge: Louisiana State University Press, 1994); Bobby Roberts & Carl H. Moneyhon, *Portraits of Conflict: A Photographic History of Arkansas in the Civil War* (Fayetteville: University of Arkansas Press, 1987); Michael B. Dougan, *Confederate Arkansas* (University: University of Alabama Press, 1976), 35-39. An earlier, frequently-cited work is David Y. Thomas, *Arkansas in War and Reconstruction 1861-1874* (Little Rock: United Daughters of the Confederacy, 1926).
2. 24 Ark. 155 (1863).
3. 24 Ark. 161 (1866).
4. ARK. CONST. of 1836, art. VI, §§ 1, 7.
5. *Id.* art. VI, § 2. The court's judgment and chancery records usually referred to the associate justices as "judge."
6. *Id.* art. VI, § 7.
7. ARK. CONST. of 1836, art. 7, § 6.
8. Act of Dec. 13, 1838, 2nd Ark. General Assembly, 1839 Ark. Acts 4.
9. ARK. CONST. of 1836, art. VI, § 2.
10. Act of Dec. 13, 1838, 2nd Ark. General Assembly, 1839 Ark. Acts 4.
11. Ark. Sup. Ct. Judgment Record G, at 240 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).
12. Act 32 of 12th Ark. General Assembly, 1859 Ark. Acts 28.
13. S. DOC. NO. 100-34, at 1215 (1989); John Hallum, *Biographical and Pictorial History of Arkansas* (Albany: Weed, Parsons & Co., printers, 1887), 1:301-302; Fay Hempstead, *Historical Review of Arkansas; Its Commerce, Industry and Modern Affairs* (Chicago: The Lewis Publishing Company, 1911), 1:449-51; *Encyclopedia of the New West (Arkansas Section)* (William S. Speer & John Henry Brown, eds., Marshall, TX: The United States Biographical Publishing Co., 1881), 11-13; James H. Rice & Kathryn Donham Rice, "Elbert Hartwell English—Lawyer, Chief Justice, Educator, Grand Master," *Pulaski County Hist. Rev.* 36 (1988): 26-38; "Chief Justice English," *Ark. Gazette*, Sept. 2, 1884, at 5; "Appropriate Remarks," *Ark. Gazette*, Oct. 9, 1884, at 2.

14. Statement of E.H. English dated November 25, 1853, *reprinted in* "Preface," *Arkansas Reports*, Volume 13.

15. Statement of E.H. English dated July 29, 1848, *reprinted in* "Preface," *Digest of the Statutes of Arkansas* (1848).

16. *Senate Journal of 7th Ark. General Assembly* (1849), 106. The election required seven ballots. *Id.*

17. *Senate Journal of 10th Ark. General Assembly* (1855), 226-27; Ark. Sup. Ct. Judgment Record F, at 309.

18. *House Journal of 13th Ark. General Assembly* (1861), 117-18.

19. "Chief Justice English," *supra* note 13; "Appropriate Remarks," *supra* note 13.

20. Hallum, *Biographical & Pictorial History*, *supra* note 13, at 318-20; Hempstead, *Historical Review*, *supra* note 13, at 455-56; "Judge Compton," *Ark. Gazette*, May 30, 1893, at 3.

21. *Senate Journal of 12th Ark. General Assembly* (1859), 498; Ark. Sup. Ct. Judgment Record G, at 274 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

22. Hallum, *Biographical & Pictorial History*, *supra* note 13, at 323; Hempstead, *Historical Review*, *supra* note 13, at 455.

23. Hallum, *Biographical & Pictorial History*, *supra* note 13, at 365-67; Hempstead, *Historical Review*, *supra* note 13, at 454.

24. See generally Morton Gitelman, "The First Chancery Court in Arkansas," *Ark. Hist. Q.* 55 (1996): 357, 375-79.

25. *Senate Journal of 12th Ark. General Assembly* (1859), 498. Compton defeated Fairchild on the fourth ballot. *Id.* at 496-98.

26. Ark. Sup. Ct. Judgment Record G, at 408-09 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

27. ARK. CONST. of 1836, art. V, § 15.

28. *House Journal of 13th Ark. General Assembly* (1861), 118-19.

29. Governor Conway anticipated this problem because at the same time he appointed Fairchild, Conway designated Arkadelphia attorney Harris Flanagin to sit as a special justice in the numerous chancery appeals that were pending when Fairchild moved to the higher bench. The order appointing Flanagin, which lists the cases in which he was to sit, appears in Ark. Sup. Ct. Judgment Record G, at 409 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

30. See generally Michael Dougan, "A Look at the 'Family' in Arkansas Politics, 1858-1865," *Ark. Hist. Q.* 29 (1970): 99, 100-104. Rector received 31,578 votes to Johnson's 28,622 votes. *Ark. Secretary of State, Historical Report of the Secretary of State* (1986), 241.

31. *House Journal of the 13th Ark. General Assembly* (1861), 96.

32. *Id.* at 104-05. See also Dougan, *Confederate Arkansas*, *supra* note 1, at 103.

33. Dougan, *Confederate Arkansas*, *supra* note 1, at 35-39.

34. *House Journal of 13th Ark. General Assembly* (1861), 410.

35. *Id.* at 586. After adopting several amendments the house approved the senate bill. *Id.* at 590. The senate then concurred in the house amendments, and Governor Rector immediately signed the bill. See Act 105 of 13th Ark. General Assembly, 1861 Ark. Acts 214.

36. The *Arkansas Gazette* reported that 23,626 votes were cast in favor of union candidates versus 17,927 votes in favor of secession candidates. *Ark. Gazette*, Mar. 9, 1861, at 2. See also Dougan, *Confederate Arkansas*, *supra* note 1, at 45.

37. *Journal of Both Sessions, the Convention of the State of Arkansas, Which Were Begun and Held in the Capitol, in the City of Little Rock 11* (1861): 64-66, 82 [hereinafter "*Journal of Both Sessions*"].

38. *Id.* at 90-93.

39. *Id.* at 111.

40. Ark. Sup. Ct. Judgment Record G, at 508-585; Ark. Sup. Ct. Chancery Record C, at 78-108 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

41. Ark. Sup. Ct. Judgment Record G, at 562; Ark. Sup. Ct. Chancery Record C, at 102 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

42. The opinions are reported in 22 Ark. 453-601 and 23 Ark. 1-346.

43. Dougan, *Confederate Arkansas*, *supra* note 1, at 197.

44. Proclamation of the President of the People of the State of Arkansas, reconvening the Convention (Apr. 20, 1861), *reprinted in Journal of Both Sessions*, *supra* note 37, at 113-14.

45. *Journal of Both Sessions*, *supra* note 37, at 121-24.

46. Act 105 of 13th General Assembly, § 8, 1860 Ark. Acts 216.

47. *Journal of Both Sessions*, *supra* note 37, at 259.

48. *Id.* at 381.

49. *Id.* at 419-23, 425-27, 430-44, 446-50.

50. *Id.* at 450. Since the journal does not reflect the final vote, it was presumably approved by acclamation.

51. ARK. CONST. of 1861, art. VI, § 7.

52. See Cal Ledbetter, Jr., "The Office of Governor in Arkansas History," *Ark. Hist. Q.* 37 (1978): 44, 57.

53. ARK. CONST. of 1861, art. VI, § 7.

54. Ark. Sup. Ct. Judgment Record G, at 586; Ark. Sup. Ct. Chancery Record C, at 109 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

55. Ark. Sup. Ct. Judgment Record G, at 586-88; Ark. Sup. Ct. Chancery Record C, at 109-11 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

56. Ark. Sup. Ct. Judgment Record 5, at 589-97; Ark. Sup. Ct. Chancery Record C, at 111-14 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

57. Compton owned twenty slaves, Fairchild owned six slaves, and English owned three. U.S. Bureau of Census, Population Schedule of the Eighth Census of the United States 1860, Princeton Township, Dallas County, Arkansas (Compton), *microformed on* National Archives Pub. No. 653, Reel 40; Ruddell Township, Independence County, Arkansas (Fairchild), *microformed on* National Archives Pub. No. 653, Reel 43; and City of Little Rock, Pulaski County, Arkansas (English), *microformed on* National Archives Pub. No. 653, Reel 49.

58. *Journal of Both Sessions*, *supra* note 37, at 290-93.

59. *True Democrat* (Little Rock), May 30, 1861, at 2.

60. *Journal of Both Sessions*, *supra* note 37, at 299.

61. Act 32 of 12th Ark. General Assembly, 1859 Ark. Acts 28. See *supra* text accompanying note 12.

62. Ark. Sup. Ct. Judgment Record G, at 598; Ark. Sup. Ct. Chancery Record C, at 114 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

63. ARK. CONST. of 1861, schedule, § 4.

64. E.H. English to Dr. John A. Jordan (Aug. 21, 1861) *reprinted in* *True Democrat* (Little Rock), Sept. 5, 1861, at 2.

65. The court met on November 8, 16, 23, and 30. Ark. Sup. Ct. Judgment Record G, 599-601; Ark. Sup. Ct. Chancery Record C, at 115 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). Justice Fairchild was present only on November 30. Ark. Sup. Ct. Judgment Record G, at 601; Ark. Sup. Ct. Chancery Record C, at 115 (both on file with Univ. of Arkansas, Little

Rock—Pulaski County Law Library Special Collections).

66. Ark. Sup. Ct. Judgment Record G, at 602-29; Ark. Sup. Ct. Chancery Record C, at 116-35 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

67. Ark. Sup. Ct. Judgment Record G, at 616-23; Ark. Sup. Ct. Chancery Record C, at 127-32 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). Fairchild did not participate in many of the cases decided during the December term because they were appeals from decisions he had rendered as chancellor.

68. Ark. Sup. Ct. Judgment Record G, at 627; Ark. Sup. Ct. Chancery Record C, at 134 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

69. Ark. Sup. Ct. Judgment Record G, at 629 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). The opinions issued during December 1861 and January 1862 are reported in 23 Ark. 429-722.

70. Ark. Sup. Ct. Judgment Record G, at 630-32; Ark. Sup. Ct. Chancery Record C, at 136-37 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). The seven opinions decided in May 1862 are reported at 23 Ark. 722-80.

71. Set out below is a breakdown of the twenty-four counties from which appeals were heard at the December 1861 term. Counties lying entirely north of a line running from Helena to Little Rock to Fort Smith are indicated by asterisk:

Ashley	2
Chicot	6
Clark	3
Conway	1*
Desha	4
Drew	1
Greene	1*
Hempstead	1
Independence	5*
Jackson	2*
Jefferson	3
Montgomery	1
Ouachita	2
Perry	1
Phillips	2* (includes Helena)
Pope	1*
Prairie	2

Pulaski	16
Randolph	1*
Saline	1
St. Francis	1*
Union	1
Washington	1*
Yell	1
Unclear	<u>1</u>
Total	61

72. Thirty-three of the 114 appeals heard in January and six of the thirteen appeals heard in May were from northern counties.

73. See generally Edwin C. Bearss, "The Battle of Pea Ridge," *Ark. Hist. Q.* 20 (1961): 74.

74. *Id.* at 41. See May 19—Skirmish at Searcy Landing, Ark.—"Reports" reprinted in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, ser. I, vol. 13, 69-79 (1885) [hereinafter "*Official Records*"].

75. Wendy Richter, "The Impact of the Civil War on Hot Springs, Arkansas," *Ark. Hist. Q.* 43 (1984): 125, 130.

76. Maj. Gen. Saml. R. Curtis to Maj. Gen. Halleck (July 10, 1862), reprinted in *Official Records*, *supra* note 74, at ser. I, vol. 13, 141; Maj. Gen. Thomas C. Hindman to Gen. S. Cooper, Adjutant and Inspector Gen. (June 19, 1862) reprinted in *Official Records*, *supra* note 74, at ser. I, vol. 13, 31. See generally Edwin C. Bearss, "The White River Expedition June 10-July 15, 1862," *Ark. Hist. Q.* 21 (1962): 305; William L. Shea, "The Confederate Defeat at Cache River," *Ark. Hist. Q.* 52 (1993): 129.

77. Ark. Sup. Ct. Judgment Record G, at 633; Ark. Sup. Ct. Chancery Record C, at 138 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

78. Ark. Sup. Ct. Judgment Record G, at 633-35 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). During its August meeting the court refused to issue a writ of mandamus in *Ex parte Robinson*, but this opinion does not appear in the official reports. *Id.* at 634. English and Compton did meet on each Monday during November of 1862 to dispose of procedural matters. *Id.* at 635-37; Ark. Sup. Ct. Chancery Record C, at 139 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

79. ARK. CONST. of 1861, schedule, § 4.

80. Under both the 1836 and 1861 Constitutions the secretary of state, the treasurer, and the auditor were all elected by the General Assembly. ARK. CONST. of 1836, art. V, §§ 14 and 24; ARK. CONST. of 1861, art. V, §§ 14 and 24.

81. *Journal of Both Sessions, supra* note 37, at 449.

82. Dougan, *Confederate Arkansas, supra* note 1, at 66.

83. *Washington Tel.*, July 23, 1862, at 2.

84. *Ark. Gazette*, July 12, 1862, at 1. Danley was right. The law required the sheriff of each county to give notice by proclamation of the time and place of each general election and the officers to be elected. *Digest of the Statutes of Arkansas*, ch. 62, sec. 20 (1858).

85. 24 Ark. 2 (1862).

86. Ark. Sup. Ct. Judgment Record G, at 633-34 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

87. 24 Ark. at 4.

88. *Id.* at 5-6.

89. ARK. CONST. of 1836, art. V, § 24.

90. 24 Ark. at 6.

91. Rector's address is printed in *Ark. Gazette*, Sept. 5, 1862, at 2; and *Washington Tel.*, Sept. 17, 1862, at 1.

92. Rector concluded his address with the statement: "But, fellow citizens, be the election of Governor legal or illegal, I am prepared to give you an account of my Stewardship and will cheerfully abide the result of your decision." *Ark. Gazette*, Sept. 5, 1862, at 2; *Washington Tel.*, Sept. 17, 1862, at 1.

93. Dougan, *Confederate Arkansas, supra* note 1, at 94-95. Flanagan received 18,189 votes to Rector's 7,419. *True Democrat* (Little Rock), Nov. 12, 1862, at 1.

94. General Orders No. 17, Headquarters, Trans-Miss. Dist. (June 17, 1862), reprinted in *Official Records, supra* note 74, at ser. I, vol. 13, 835.

95. See generally Daniel E. Sutherland, "Guerrillas: The Real War in Arkansas," *Ark. Hist. Q.* 52 (1993): 257; Leo E. Huff, "Guerrillas, Jayhawkers and Bushwhackers in North Arkansas During the Civil War," *Ark. Hist. Q.* 24 (1965): 127. See also Dougan, *Confederate Arkansas, supra* note 1, at 102. Early in the war both sides used the term "bushwhacker" to refer to nonaligned bands operating outside the law. As the internecine warfare turned increasingly vicious, the term tended to be applied to anyone on the other side.

96. See generally John F. Bradbury, Jr., "Buckwheat Cake Philanthropy": Refugees and the Union Army in the Ozarks," *Ark. Hist. Q.* 57 (1998): 233.

97. Ark. Sup. Ct. Judgment Record G, at 638-43; Ark. Sup. Ct. Chancery Record C, at 140-42 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

98. Ark. Sup. Ct. Judgment Record G, at 643-44; Ark. Sup. Ct. Chancery Record C, at 142-44 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

99. The following chart shows the origin of the nineteen cases decided at the December 1862 term:

Ashley	1
Chicot	2
Drew	2
Independence	1
Monroe	2
Prairie	1
Pulaski	4
Sevier	1
Union	3
Washington	1
Unclear	<u>1</u>
Total	19

Only Independence and Washington counties lie entirely north of a Helena—Little Rock—Fort Smith line. The Independence County case—*Clark v. Barnett*, 24 Ark. 30 (1863)—was docketed during the June 1861 term. Ark. Sup. Ct. Clerk's Docket, Case No. 32 (June 1861 Term). The Washington County case was *Thornberry v. Baxter*, 24 Ark. 76 (1863), also docketed during the June 1861 term. Ark. Sup. Ct. Clerk's Docket, Case No. 23 (June 1861 Term).

100. CONFEDERATE STATES OF AMERICA CONST. art. I, § 9.

101. Act 2 of 1st Confederate Congress under Permanent Const., 1st sess. (Feb. 27, 1862), *Statutes at Large of the Confederate States of America Passed at the First Session of the First Congress* 29 (James M. Matthews ed., 1862). The original suspension act was extended in October of 1862. Act 51 of 1st Confederate Congress under Permanent Const., 2d sess. (Oct. 13, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 29 (James M. Matthews ed., 1862).

102. William Robinson, Jr., *Justice in Grey: A History of the Judicial System of the Confederate States of America* (Russell & Russell 1968) (New York: 1941), 390.

103. During the May 1862 crisis caused by the Union advance down the White River, Brigadier General John S. Roane had declared martial law over Little Rock and the surrounding country. *True Democrat* (Little Rock), May 22, 1862, at 1. After he assumed command General Thomas C. Hindman extended martial law first to the Fort Smith-Van Buren area, and then throughout the state. Special Orders No. 17, Headquarters, Trans-Miss. Dist. (June 17, 1862), *reprinted in Official Records, supra* note 74, at ser. I, vol. 13, 835-36; Maj. Gen. T.C. Hindman to Gen. S. Cooper, Adjutant and Inspector Gen. (June 19, 1863), *reprinted in Official Records, supra* note 74, at ser. I, vol. 13, 38-39.

104. Maj. Gen. T.C. Hindman to Gen. S. Cooper, Adjutant and Inspector Gen. (June 19, 1863), *reprinted in Official Records, supra* note 74, at ser. I, vol. 13, 39.

105. Letter from Albert Pike to Jefferson Davis (July 3, 1862) (copy on file with Arkansas History Commission). Since Pike's letter does not appear in the *Official Records*, it may never have reached Davis. Earlier Pike had refused to permit martial law to be enforced in the Indian Territory. Brig. Gen. Albert Pike to George W. Randolph, Sec. of War (June 30, 1862), *reprinted in Official Records, supra* note 74, at ser. I, vol. 13, 848.

106. *Washington Tel.*, Sept. 17, 1862, at 2.

107. General Orders No. 56, War Department, Adjutant and Inspector Gen. Office (Aug. 6, 1862), *reprinted in Official Records, supra* note 74, at ser. IV, vol. 2, 39 (1900). *See generally* Robinson, *Justice in Grey, supra* note 102, at 391-96.

108. General Orders No. 66, Adjutant and Inspector Gen. Office (Sept. 12, 1862), *reprinted in Official Records, supra* note 74, at ser. IV, vol. 2, 83 (1900).

109. Geo W. Randolph, Secretary of War, to Maj. Gen. T.H. Holmes, Commanding Trans-Miss. Dept. (Oct. 11, 1862), *reprinted in Official Records, supra* note 74, at ser. I, vol. 13, 886.

110. S. Cooper, Adjutant and Inspector Gen., to Lt. Gen. Holmes (Jan. 29, 1863), *reprinted in Official Records, supra* note 74, at ser. I, vol. 22, pt. II, 780 (1888).

111. General Orders No. 9, Headquarters Trans-Miss. Dept. (Feb. 9, 1863), *reprinted in Ark. Gazette*, Feb. 14, 1863, at 2.

112. *Ark. Gazette*, June 27, 1863, at 1.

113. The first conscription act applied to men between the ages of eighteen and thirty-five. Act 31 of 1st Confederate Congress under Permanent Const., 1st sess. (Apr. 16, 1862), *Statutes at Large of the Confederate States of America Passed at the First Session of the First Congress* 29 (James M. Matthews ed., 1862). The act was later extended to cover men between the ages of thirty-five and forty-five. Act 25 of 1st Confederate Congress under the Permanent Const., 2d sess. (Sept. 27, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 61 (James M. Matthews ed., 1862).

114. An act passed on April 21, 1862, exempted numerous occupations from military service. Act 74 of 1st Confederate Congress under Permanent Const., 1st sess. (Apr. 21, 1862), *Statutes at Large of the Confederate States of America Passed at the First Session of the First Congress* 51 (James M. Matthews ed., 1862). In October of 1862 a more extensive list of exemptions replaced the earlier list. Act 45 of 1st Confederate Congress under Permanent Const., 2d sess. (Oct. 11, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 77 (James M. Matthews ed., 1862).

115. *Ark. Gazette*, Dec. 13, 1862, at 2.

116. One military doctor who was sent to Camden in the summer of 1862 to examine potential conscripts commented in a letter to his wife:

I have done lots of little, mean, disagreeable pieces of work since the war began, but the meanest of the mean is the task of examining Conscripts. Of all the imaginary diseases, as well as real ones, to which flesh is heir, they have them. I think it must have been in South Arkansas that Pandarus opened his box of diseases.

Dr. Junius Bragg to Josephine Bragg (July 6, 1862), *reprinted in Letters of a Confederate Surgeon* (T.J. Gaughan, ed., 1960), 76.

Some Arkansas physicians were apparently too free in granting disability exemptions. A February 1863 notice in the *Arkansas Gazette* advised that all exemptions previously granted by Searcy physician R. O. Blakely had been revoked and that those men holding such exemptions should arrange to be reexamined. *Ark. Gazette*, Feb. 7, 1863, at 2.

117. Act 45 of 1st Confederate Congress under Permanent Const., 2d sess. (Oct. 11, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 79 (James M. Matthews ed., 1862).

118. *Id.*

119. H. Flanagan to Lt. Gen. Holmes (Dec. 1, 1862), *reprinted in Ark. Gazette*, Dec. 27, 1862, at 2. Eakin of the *Washington Telegraph* immediately objected to the governor's interpretation and proposed that the question be referred to the courts. *Washington Tel.*, Dec. 24, 1862, at 2.

120. General Orders No. 1, Headquarters, Trans-Miss. Dept., Office Com'dt Conscripts (Dec. 18, 1862), *reprinted in Ark. Gazette*, Dec. 27, 1862, at 2. The exemption was revoked on February 3, 1863. General Orders No. 3, Headquarters, Trans-Miss. Dept., Office Com'dt Conscripts (Feb. 3, 1863), *reprinted in Ark. Gazette*, Feb. 7, 1863, at 2. The revocation apparently created problems for some planters because the effective date of revocation was later suspended. See General Orders No. ___, Headquarters, Trans-Miss. Dep't, Office Com'dt Conscripts (Feb. 10, 1863), *reprinted in Ark. Gazette*, Feb. 21, 1863, at 2.

121. In 1860 less than four percent of the white population of Arkansas owned slaves. Orville W. Taylor, *Negro Slavery in Arkansas* (1958), 56. Of course, an unknown number of young men who did not personally own slaves belonged to families that owned slaves. *Id.*

122. The *Gazette* was responding to this complaint in May 1861 when it called for slave ownership to be "diffused" throughout the white population so as to give the masses an economic stake in the war. *Ark. Gazette*, May 25, 1861, at 2. To effectuate this "diffusion" the *Gazette* proposed that a number of slaves proportional to the needs of each family be exempted from the claims of creditors. *Id.*

123. *Washington Tel.*, Dec. 17, 1862, at 2.

124. *Id.*

125. Dougan, *Confederate Arkansas*, *supra* note 1, at 100.

126. The court also issued seven routine decisions when it reconvened in April. These seven decisions are reported at 24 Ark. 44-78.

127. The opinion can be found in Ark. Sup. Ct. Opinion Book K, at 483 (on file with Arkansas History Commission).

128. *Id.* at 485.

129. *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227 (date uncertain); *Commonwealth v. Chandler*, 11 Mass. (10 Tyng) 83 (1814); *Commonwealth v. Cushing*, 11 Mass. (10 Tyng) 66 (1814); *Commonwealth v. Harrison*, 11 Mass. (10 Tyng) 63 (1814); *In re Carlton*, 7 Cow. 471 (N.Y. Sup. Ct. 1827); *In re Stacy*, 10 John. 328 (N.Y. Sup. Ct. 1813); *In re Ferguson*, 9 Johns. 237 (N.Y. Sup. Ct. 1812); *Commonwealth v. Fox*, 7 Penn. 336 (1847); *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (circa 1821).

130. 62 U.S. 506 (1858).

131. Ark. Sup. Ct. Opinion Book K, at 489 (on file with Arkansas History Commission).

132. *Id.*

133. *Digest of the Statutes of Arkansas*, ch. 82, art. III, sec. 7 (1858).

134. Ark. Sup. Ct. Opinion Book K, at 490 (on file with Arkansas History Commission).

135. *Rugged and Sublime*, *supra* note 1, at 18; Dougan, *Confederate Arkansas*, *supra* note 1, at 74.

136. Act 41 of 13th Ark. General Assembly, 1st Spec. Sess., 1861 Ark Acts 50.

137. Ark. Sup. Ct. Opinion Book K, at 492-494 (on file with University of Arkansas Archives). The court conceded that use of the plural "slaves" meant that a plantation required more than one slave. *Id.* at 493.

138. Ark. Sup. Ct. Judgment Record K, at 483 (on file with Arkansas History Commission).

139. *Id.* at 496. It was unclear from the record whether Hebert was conscripted before or after the plantation exemption went into effect. Hebert had also failed to prove that there was no white person left on his plantation to supervise slaves.

140. A year later the Confederate Congress did suspend the writ of habeas corpus with respect to persons arrested or detained by order of the president or the commander of the Trans-Mississippi Military Department. Act 37 of 1st Confederate Congress under the Permanent Const., 4th sess. (Feb. 15, 1864), *Statutes at Large of the Confederate States of America Passed at the Fourth Session of the First Congress* 187 (James M. Matthews ed., 1864). A directive to the commander of the Trans-Mississippi Department identified persons seeking to avoid military service as the most appropriate case for suspension of the writ. James A. Seddon, Sec. of War to Gen. E.K. Smith (Mar. 19, 1864) *reprinted in Official Records*, *supra* note 74, at ser. IV, vol. 3, 231 (1900).

141. *Ark. Gazette*, June 27, 1863, at 1.

142. *Washington Tel.*, June 3, 1862, at 2.

143. Ark. Sup. Ct. Judgment Record K, at 483 (on file with Arkansas History Commission).

144. Ark. Sup. Ct. Judgment Record K, at 483 (on file with Arkansas History Commission).

145. Act 80 of 1st Confederate Congress under Permanent Const., 3rd sess. (May 1, 1863), *Statutes at Large of the Confederate States of America Passed at the Third Session of the First Congress* 158 (James M. Matthews ed., 1863).

146. *Id.* at sec. 2.

147. Ark. Sup. Ct. Judgment Record H, at 6; Ark. Sup. Ct. Chancery Record C, at 141 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

148. Shown below is the style of each case decided by the court during the June term while still in Little Rock, the county from which each opinion was appealed, and the cite at which each opinion appears in the official reports:

<i>Style of Case</i>	<i>County</i>	<i>Reported at</i>
State v. Clendenin	Pulaski	24 Ark. 79
Burt v. Williams	Pulaski	24 Ark. 91
M.,O.&R.R.R.R. Co. v. Gaster	Drew	24 Ark. 96
Taylor v. Armstrong	Pope	24 Ark. 102
Marlow v. Adams	Prairie	24 Ark. 109
Finn v. Hempstead	Hempstead	24 Ark. 111
Cunningham v. Clendenin	Unclear	Not reported
Griffith v. Morrow	Pulaski	Not reported
Sweeten v. Clendenin	Saline	Not reported

149. 24 Ark. 91 (1863).

150. *Washington Tel.*, Aug. 6, 1862, at 2.

151. *Washington Tel.*, Sept. 17, 1862, at 2.

152. Act approved Dec. 1, 1862, by 14th Ark. General Assembly, *Acts Passed at the 14th Session of the General Assembly of Arkansas* 72-73 (first published by Statute Law Book Co., 1896) [hereinafter "*Acts of 14th Ark. General Assembly*"].

153. Ark. Sup. Ct. Opinion Book K, 506 (on file with Arkansas History Commission).

154. ARK. CONST. of 1861, art. II, § 11.

155. *Id.*, art. II, § 18.

156. *Id.*, art. III, §§ 1 and 2.

157. 24 Ark. 78 (1863). Although the official reports published after the war indicate that this opinion was rendered during the December 1862 term, the supreme court records clearly show that the opinion was issued on June 16, 1863, during the June 1863 term. *See* Ark. Sup. Ct. Judgment Record H, at 7 (On file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections); Ark. Sup. Ct. Opinion Book K, at 497 (on file with Arkansas History Commission).

158. *Historical Report of Secretary of State*, *supra* note 30, at 338.

159. *Id.* at 315.

160. ARK. CONST. of 1861, art. IV, § 13. The 1836 constitution was less clear on this point. *See* ARK. CONST. of 1836, art. IV, § 14.

161. A writ of *quo warranto* was the traditional method of requiring a public officer to prove his right to hold office. It is discussed in more detail elsewhere in this article. See *infra* text accompanying note 239.

162. 24 Ark. at 79.

163. ARK. CONST. of 1836, art. IV, § 5.

164. ARK. CONST. of 1861, art. IV, § 5.

165. 24 Ark. at 91. Since all rather than half the senate seats were on the ballot in the 1862 election, the court's decision called into question the 1862 election of half of the Arkansas senate.

166. Ark. Sup. Ct. Opinion Book K, at 519 (on file with Arkansas History Commission).

167. Although the opinion does to mention Griffith's first name, he was probably James M. Griffith who is listed as a captain in Company G, 20th Arkansas Infantry. SUPPLEMENT TO THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, vol. 2, pt. II, ser. No. 14 (1994).

168. The 20th Arkansas surrendered at Vicksburg in July of 1863. Its members were exchanged, and the unit later fought in Arkansas and Missouri. Thomas, *Arkansas in War*, *supra* note 1, at 349.

169. Ark. Sup. Ct. Opinion Book K, at 519 (on file with Arkansas History Commission).

170. George King was a colonel in the Confederate Army and the first commander of the 20th Arkansas. Thomas, *Arkansas in War*, *supra* note 1, at 349.

171. Ark. Sup. Ct. Opinion Book K, at 519-20 (on file with Arkansas History Commission).

172. *Id.* at 522.

173. *Id.* at 523. The opinion is dated August 30, 1863, but the judgment record indicates that the writ was issued on August 5, 1863. Ark. Sup. Ct. Judgment Record H, at 11. This opinion was never published in the official reporter.

174. Act 45 of 1st Confederate Congress under Permanent Const., 2d sess. (Oct. 11, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 77 (James M. Matthews ed., 1862).

175. Holt also claimed exemption as a physician but offered no evidence that he had ever practiced medicine. Ark. Sup. Ct. Opinion Book K, at 523 (on file with Arkansas History Commission).

176. *Id.*

177. *Digest of the Statutes of Arkansas*, ch. 113, sec. 1 (1858).

178. The original conscription act authorized the president to place into military service all white males between the ages of eighteen and thirty-five. Act 31 of 1st Confederate Congress under Permanent Const., 1st sess. (Apr. 16, 1862), *Statutes at Large of The Confederate States of America Passed at The First Session of The First Congress* 29 (James M. Matthews ed., 1862). A second conscription act extended coverage to include white males between the ages of thirty-five and forty-five. Act 25 of 1st Confederate Congress Under Permanent Const., 2d sess. (Sept. 27, 1862), *Statutes at Large of The Confederate States of America Passed at The Second Session of The First Congress* 61 (James M. Matthews ed., 1862).

179. Ark. Sup. Ct. Opinion Record K, at 528 (on file with Arkansas History Commission).

180. Lt. Gen. Theophilus H. Holmes to Brig. Gen. W. R. Rogers, Chief of Staff, Trans-Miss. Dept. (Aug. 14, 1863), *reprinted in Official Records, supra* note 74, at ser. I, vol. 22, pt. I, 408-11 (1888). *See generally* Edwin C. Bearss, "The Battle of Helena, July 4, 1863," 20 *Ark. Hist. Q.* 20 (1961): 256.

181. Maj. Gen. Frederick Steele to Maj. Gen. Schofield, Commanding, Dept. of Missouri (Sept. 12, 1863), *reprinted in Official Records, supra* note 74, at ser. I, vol. 22, pt. I, 474-78 (1888).

182. *Id.* Union forces suffered only 137 casualties during their month long advance on Little Rock. *Official Records, supra* note 74, at ser. I, vol. 22, pt. I, 482 (1888). The Little Rock campaign is also described in Dougan, *Confederate Arkansas, supra* note 1, at 102-104; Leo E. Huff, "The Union Expedition Against Little Rock, August-September, 1863," *Ark. Hist. Q.* 22 (1963): 224; *Washington Tel.*, Sept. 23, 1863, at 2.

183. Ark. Sup. Ct. Judgment Record H, at 13; Ark. Sup. Ct. Chancery Record C, at 151 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). Earlier the General Assembly had approved legislation empowering the judges to move the court to a temporary seat of government. Act of November 27, 1862, of 14th Ark. General Assembly, *Acts of 14th Ark. General Assembly, supra* note 150, at 83.

184. Peyton English's circuitous route from Little Rock to Washington is described in Eleanor F. Cooke, "He Saved the Records of the State," *Ark. Democrat Mag.*, Sept. 9, 1951. *See also* Rice & Rice, "Elbert Hartwell English," *supra* note 13, at 33.

185. H.F. Fairchild to Governor Flanagin (Oct. 8, 1863) (on file with Arkansas History Commission, Oldham Collection).

186. Ark. Sup. Ct. Judgment Record H, at 13-17; Ark. Sup. Ct. Chancery Record C, at 151-54 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

187. Ark. Sup. Ct. Judgment Record H, at 13; Ark. Sup. Ct. Chancery Record C, at 151 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

188. Opinions of the Arkansas Supreme Court Delivered at Washington, the Temporary Seat of Government 106 [hereinafter "Ark. Sup. Ct. Washington Opinion Book"] 45-100. Shown below is the style of each case decided by the court in the fall of 1863, the county from which each opinion was appealed, and the cite at which each opinion appears in the post-war official reports are shown below:

<i>Style of Case</i>	<i>County</i>	<i>Reported at</i>
Quillin v. Sibby	Ouachita	Not reported
Shaver & Son v. Shell	Izard	24 Ark. 122
Pike v. Underhill's Admin.	Lafayette	24 Ark. 124
Loring v. Flora	Jefferson	24 Ark. 151
McKenzie v. Murphy	Phillips	24 Ark. 155
Schaer v. Glisten	Pulaski	24 Ark. 137
Daniel v. Roper	Ashley	24 Ark. 131
Christian v. Ashley County	Ashley	24 Ark. 143

By the fall of 1863 Izard, Jefferson, Phillips, and Pulaski counties were beyond Confederate control.

189. Ark. Sup. Ct. Judgment Record H, at 17; Ark. Sup. Ct. Chancery Record C, at 154 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

190. A turn-of-the-century biographer said of Fairchild: "During the rebellion he adhered to the southern cause; but sadly, for his mind was too clear for him to be blind to the error of secession." Hempstead, *Historical Review*, *supra* note 13, at 454.

191. H.F. Fairchild to Governor Flanagan (Nov. 25, 1863) (on file with Arkansas History Commission, Oldham Collection).

192. *Id.*

193. *Id.*

194. Ark. Sup. Ct. Judgment Record H, at 18; Ark. Sup. Ct. Chancery Record C, at 155 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

195. Ark. Sup. Ct. Judgment Record H, at 18; Ark. Sup. Ct. Chancery Record C, at 155 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). On November 13, 1863, the court had appointed A. B. Williams to act as temporary attorney general

in a case involving the release on bail of a man indicted for murder in Columbia County. Ark. Sup. Ct. Judgment Record H, at 15 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

196. Presidential Proclamation dated December 8, 1863, 13 Stat. 737 (1866).

197. *See generally Journal of The Convention of Delegates of the People of Arkansas Assembled at the Capitol, January 4, 1864* (1870).

198. Maj. Gen. F. Steele to A. Lincoln, President of U.S. (Nov. 30, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 41, pt. IV, 723 (1893).

199. *Historical Report of the Secretary of State, supra* note 30, at 241.

200. Ark. Sup. Ct. Judgment Record A, No. 2, at 2-4 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). The supreme court organized under the Constitution of 1864 issued its first written opinion in December of 1865. *See Rison v. Farr*, 24 Ark. 161 (1865).

201. F.W. Compton to Governor Flanagin (Mar. 12, 1864) (on file with Arkansas History Commission, Oldham Collection).

202. Ark. Sup. Ct. Judgment Record H, at 18; Ark. Sup. Ct. Chancery Record C, at 155 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

203. *See* Strength and organization of the expeditionary forces commanded by Maj. Gen. Frederick Steele, U.S. Army (Mar. 31, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 34, pt. I, 657 (1891).

204. Maj. Gen. Fred'k Steele to Maj. Gen. N.P. Banks (Feb. 28, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 34, pt. II, 449-50 (1891).

205. Capt. Junius B. Wheeler, Chief Engineer, U.S. Corps of Engineers, to Maj. W.D. Green, U.S. Army Asst. Adjutant Gen. (May 5, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 34, pt. I, 674 (1891).

206. Maj. Gen. F. Steele to Maj. Gen. H. W. Halleck, U.S. Army Chief of Staff (May 4, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 34, pt. I, 667-71 (1891). *See generally* William L. Shea, "The Camden Fortifications," *Ark. Hist. Q.* 41 (1982): 318, 321-22; Ira Don Richards, "The Battle of Jenkins' Ferry," *Ark. Hist. Q.* 20 (1961): 3; Ira Don Richards, "The Engagement at Marks' Mills," *Ark. Hist. Q.* 19 (1960): 51; Ira Don Richards, "The Battle of Poison Springs," *Ark. Hist. Q.* 18 (1959): 338.

207. *The Camden (Arkansas) Expedition, Summary of the Principal Events, Official Records*, *supra* note 74, at ser. I, vol. 34, pt. I, 654 (1891) (listing skirmish near Princeton on April 28, 1864). *See also* Lt. Col. B. Elliott, 1st Mo. Cav. Bn., to Capt. McArthur, Asst. Adjutant Gen. (May 6, 1864), *reprinted in Official Records, supra* note 74, at ser. I, vol. 34, pt. I, 654 (1891) (describing the action near Princeton from Confederate perspective).

208. Carl H. Moneyhon, "Life in Confederate Arkansas: The Diary of Virginia Davis Gray, 1863-1865, Part I," *Ark. Hist. Q.* 42 (1983): 82-83.

209. A letter written by English in the summer of 1864 refers to an event toward the end of February 1864, "when but one of the Judges was at Washington." Letter from E.H. English and Albert Pike to Gov. Harris Flanagin (June 29, 1864) (on file with Arkansas History Commission). Since Compton was still at Princeton as late as March 12, 1864, the judge referred to could only have been English.

Additional evidence that English was still in Washington in early March of 1864 comes from a record book kept with respect to English's home at 815 Center Street in Little Rock. The cornerstone of the house was laid on March 10, 1858, and each March 10th a group of English's friends gathered to celebrate the anniversary. According to the March 10, 1864, entry, English was "in Dixie" and did not attend the annual gathering. *See* Record of Corner Stone Laid at home of Judge Elbert Hartwell English and Julia F. English at 12 o'clock noon March 10, 1859, located block facing west on Center St. between 8th and 9th Sts. Little Rock, Arkansas (manuscript on file with James H. Rice, great-grandson of Elbert H. English) [hereinafter cited as "English Home Record"].

210. Ark. Sup. Ct. Judgment Record H, at 18; Ark. Sup. Ct. Chancery Record C, at 155 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

211. The commander of Federal troops in Little Rock was criticized by his own officers for permitting known Confederates to pass freely through his lines. Benjamin Boulden, "So Long as Strangers Are the Rulers: General Frederick Steele and the Politics of Wartime Reconstruction in Arkansas" (Dec. 1992): 38-39 (unpublished M.A. thesis, University of Arkansas) (on file with University of Arkansas, Fayetteville, Arkansas).

212. Memoir of Susan Bricelin Fletcher, entry of 9 May 1864 (on file with University of Arkansas, Fayetteville, Arkansas, Special Collections).

213. *Ark. Gazette*, Jan. 22, 1871, at 2 (announcing the death of Noah D. English).

214. Ark. Sup. Ct. Judgment Record H, at 19 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

215. Walter Lee Brown, *A Life of Albert Pike* (1997), 3-28, 36.

216. *Id.* at 45-46, 58, 61-85.

217. Act dated December 14, 1838, 2d Ark. General Assembly, 1837 Ark. Acts 27.

218. Brown, *Albert Pike*, *supra* note 215, at 228-40, 269, 293-336.

219. *Id.* at 361-73.

220. Special Orders No. 234, Adjutant & Inspector Gen. Office (Nov. 22, 1861), *reprinted in Official Records*, *supra* note 74, at ser. I, vol. 8, 690 (1883).

221. *See generally* Walter L. Brown, "Albert Pike and the Pea Ridge Atrocities," *Ark. Hist. Q.* 38 (1979): 345, 346.

222. Maj. Gen. Thomas C. Hindman to Gen. S. Cooper, Adjutant and Inspector Gen. (June 19, 1863) *reprinted in Official Records*, *supra* note 74, at ser. I, vol. 13, 41-42 (1885); Maj. Gen. Th. H. Holmes to Sec. of War (Nov. 15, 1862), *reprinted in id.* at 921; Brig. Gen. Albert Pike to President of C.S. (Nov. 19, 1862), *reprinted in id.* at 921; Albert Pike to George W. Randolph, Sec. of War (Nov. 22, 1862), *reprinted in id.* at 927.

223. Brown, *Albert Pike*, *supra* note 215, at 417-24.

224. Ark. Sup. Ct. Judgment Record H, at 20; Ark. Sup. Ct. Chancery Record, at 157 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

225. *Washington Tel.*, July 6, 1864, at 2.

226. Ark. Sup. Ct. Judgment Record H, at 24. *Rogers v. Swink*, which the court decided on August 27, 1864, was not included in the official reports after the war, probably because it involved the replevin of a slave. The opinion appears in Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 421.

227. Ark. Sup. Ct. Judgment Record H, at 24 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

228. On July 6, 1864, the *Washington Telegraph* reported that Compton would not be able to attend court. *Washington Tel.*, July 6, 1864, at 2. The supreme court judgment record reflects that all three justices were present for the court session held on July 8, 1864, and Compton signed the opinions issued on that date. Ark. Sup. Ct. Judgment Record H, at 28; Ark. Sup. Ct. Chancery Record C, at 157 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

229. Ark. Sup. Ct. Judgment Record H, at 19; Ark. Sup. Ct. Chancery Record C, at 156 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

230. See the reporter's note appearing on page viii of Volume 24 of the Arkansas reports. Shown below are the seven "resurrected" opinions issued on July 8, 1864, the county from which each opinion was appealed, and the cite at which each opinion appears in the post-war official reports:

<i>Style of Case</i>	<i>County</i>	<i>Reported at</i>
Gaines v. Craig	Chicot	24 Ark. 477
Busby v. Treadwell	Jefferson	24 Ark. 456
Rice v. Harrell	Pulaski	24 Ark. 402
Twombly v. Kimbrough	Arkansas	24 Ark. 459
Trapnell v. Burton	Pulaski	24 Ark. 371
Branch v. Mitchell	Arkansas	24 Ark. 431
Marshall v. Green	Hempstead	24 Ark. 410

231. The opinion was issued July 8, 1864, and recorded in Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 106.

232. *Journal of Both Sessions*, *supra* note 37, at 404-405, 413.

233. The Confederate sequestration act of August 30, 1861, is reprinted in *Official Records*, *supra* note 74, at ser. IV, vol. 1, 586 (1900).

234. Ark. Sup. Ct. Judgment Record H, at 6-7 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

235. ARK. CONST. of 1861, art. VI, § 14 provided: "The attorney for the circuit in which the Supreme Court is held shall attend the court and prosecute for the State."

236. Ark. Sup. Ct. Judgment Record H, at 18; Ark. Sup. Ct. Chancery Record C, at 155 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). An entry in the judgment record indicates that Samuel W. Williams filed pleadings in a case on October 26, 1863, but it is not clear that he was in Washington at the time. See Ark. Sup. Ct. Judgment Record, at 13 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

237. Ark. Sup. Ct. Judgment Record H, at 23 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

238. *Id.*

239. *Black's Law Dictionary* 1256 (6th ed. 1990).

240. The opinion appears at pages 234 to 420 of Ark. Sup. Ct. Washington Opinion Book, *supra* note 188. Two years after the Civil War ended Pike became editor of the *Memphis Appeal* and published substantial portions of the *Williams* opinion in that newspaper. *See infra* note 319.

241. The majority of Arkansans could probably truthfully claim that they voted for a pro-Union delegate to the 1861 convention. Williams was not a delegate to that convention, but he was appointed to the Military Board by the convention. *Journal of Both Sessions, supra* note 37.

242. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 295. As Pike colorfully put it, a person in Williams position was entitled to have "the question whether he is a patriot or a traitor" determined by the court. *Id.* at 297.

243. Whether the United States government was formed by the states or by the people of the states was explored in the famous debates in January of 1830 between South Carolina Senator Robert Hayne and Massachusetts Senator Daniel Webster. *See* 6 CONG. DEB. 56-58 (Hayne), 72-74 (Webster) (1830). In the *Williams* decision Pike attempted to refute Webster's view that the constitution was a compact of the American people. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 326-37.

244. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 392.

245. *Id.* at 414.

246. *Id.* at 420.

247. *See supra* text accompanying notes 127-37.

248. Barber had served as supreme court clerk since 1841. *See* C.R. Stevenson, *Arkansas Territory—State And Its Highest Courts* (1946), 56.

249. Act 45 of 1st Confederate Congress under Permanent Const., 2d sess. (Oct. 11, 1862), *Statutes at Large of the Confederate States of America Passed at the Second Session of the First Congress* 77 (James M. Matthews ed., 1862) (exempting clerks in the office of state governments). *See also* Gen. Orders No. 2, Headquarters, Trans-Miss. Dist. (June 2, 1862), *Official Records, supra* note 74, at ser. I, vol. 15, 780 (1886).

250. E. H. English and Albert Pike to Harris Flanagin, Governor of Arkansas (June 29, 1864) (on file with Arkansas History Commission, Oldham collection).

251. *Id.*

252. Harris Flanagin to General E. Kirby Smith (July 1, 1864) (on file with Arkansas History Commission, Oldham Collection).

253. *Biographical and Historical Memoirs of Pulaski, Jefferson, Lonoke, Faulkner, Grant, Saline, Perry, Garland, and Hot Springs Counties, Arkansas* (Chicago: Goodspeed Publishing Co., 1889), 447. Peyton D. English's obituary also states that he enlisted in the Confederate army at Washington and served until the end of the war. "Peyton D. English Taken by Death," *Ark. Gazette*, July 18, 1921, at 1.

254. Ark. Sup. Ct. Judgment Record H, at 31 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections); Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 426, 437. The judgment book entry for January 6, 1865, is signed "Peyton D. English, Clerk," as are the two opinions recorded on that date.

255. The proclamation was reprinted in the *Washington Tel.*, Aug. 10, 1864, at 1.

256. *Washington Tel.*, July 27, 1864, at 2.

257. *Washington Tel.*, Aug. 10, 1864, at 2.

258. *Id.* Apparently, no written copy of the opinion has been preserved.

259. Proclamation of August 9, 1864 (on file with Arkansas History Commission, Harris Flanagan papers). The proclamation was printed in the *Washington Tel.*, Aug. 10, 1864, at 1.

260. *Washington Tel.*, Sept. 28, 1864, at 2.

261. *Id.*

262. *Id.*

263. The *Washington Telegraph* applauded the court's argument, which it characterized not as a judicial opinion but rather the response by one branch of government to a request from a coordinate branch of government for advice and consultation. *Washington Tel.*, Oct. 5, 1864, at 2.

264. The acts passed at the 1864 special session were initially printed in the *Washington Telegraph*. See *Washington Tel.*, Oct. 12, 1864, at 1; Oct. 19, 1864, at 1. Some thirty years after the war a private publisher, working from the records in the office of the Arkansas Secretary of State, republished the acts. See *Acts Passed at the Called Session of the General Assembly of the State of Arkansas, Which was Begun and Held in the Court-house, in the Town of Washington, Hempstead County, on Thursday, the Twenty-second Day of September, One Thousand Eight Hundred and Sixty-Four, and Ended on Sunday, the Second Day of October, One Thousand Eight Hundred and Sixty-Four* (first published by Statute Law Book Co., 1896).

265. *Id.* at 13-14. Offenses formerly punished by imprisonment that became capital offenses included second degree murder, rape, arson, burglary, robbery, counterfeiting, forging, negro stealing, horse stealing, embezzling public money, sodomy, buggery, kidnapping, perjury, subordination of perjury, bigamy, and incest.

266. *Id.* at 9.

267. Ark. Sup. Ct. Judgment Record H, at 28; Ark. Sup. Ct. Chancery Record C, at 164 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

268. Ark. Sup. Ct. Judgment Record H, at 30 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

269. Ark. Sup. Ct. Judgment Record H, at 29-30; Ark. Sup. Ct. Chancery Record C, at 164 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections). In addition to *Rector v. State*, which is discussed in the text, the court handed down its opinion in *Trammel's Heirs v. Harris*, an appeal from Ashley County. The opinion, which was not reissued after the war, appears in Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 437.

270. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 426.

271. Act of Mar. 19, 1862, 13th Ark. Gen. Assembly, 2nd Spec. Sess.; 1862 Ark. Acts I.

272. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 429.

273. Captain Thomas Rector is listed as a staff officer with the Confederate Commissary Department. *The Roster of Confederate Soldiers 1861-1865*, 13 (Janet B. Hewett ed., Wilmington: Broadfort Pub. Co., 1996), 48.

274. This may be Major C. P. King who is listed as the assistant chief of staff of Mitchell's Brigade. *Id.* at 175.

275. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 426-27.

276. *Id.* at 427.

277. *Id.* at 435.

278. *Id.*

279. *Id.* at 435-37.

280. *Terms of Military Convention*, reprinted in *Official Records*, *supra* note 74, at ser. I, vol. 48, pt. II, 600-01 (1896).

281. Maj. Gen. J.J. Reynolds to Lt. Gen. Grant (May 29, 1865), reprinted in *Official Records*, *supra* note 74, at ser. I, vol. 48, pt. II, 658 (1896) (reporting surrender of last Confederate forces in Arkansas).

282. Ark. Sup. Ct. Judgment Record H, at 31; Ark. Sup. Ct. Chancery Record C, at 164 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

283. The first opinion appeared on January 18, 1865. *See Washington Tel.*, Jan. 18, 1865, at 1.

284. *Washington Tel.*, April 19, 1865, at 1.

285. The court did not meet in June of 1861, but this was due to the transition from four terms a year to two terms, not to the war. *See supra* text accompanying note 60.

286. English missed a part of the session held on July 8, 1864. Ark. Sup. Ct. Chancery Record C, at 161-62 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

287. Ark. Sup. Ct. Judgment Record G, at 638-43; Ark. Sup. Ct. Chancery Record C, at 140-46 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

288. Ark. Sup. Ct. Judgment Record H, at 6-17, 19-27; Ark. Sup. Ct. Chancery Record C, at 147-53, 156-162 (both on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

289. F.W. Compton to Governor Flanagin (Mar. 12, 1864) (on file with Arkansas History Commission, Oldham Collection).

290. Ark. Sup. Ct. Judgment Record G, at 616-18; 638-43 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

291. *See infra* text accompanying note 317.

292. Because not all opinions were later published in printed form, this count is based on the handwritten opinions of the court during the June and December terms of 1864. During that period English produced 37 handwritten pages, and Compton produced four handwritten pages.

293. 24 Ark. at 95.

294. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 234..

295. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 259-60.

296. *See supra* note 140.

297. H.F. Fairchild to Gov. Flanagin (Dec. 12, 1863) (on file with Arkansas History Commission, Oldham collection).

298. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 426.

299. Ark. Sup. Ct. Opinion Book K, at 483 (on file with Arkansas History Commission).

300. Ark. Sup. Ct. Opinion Book K, at 519 (on file with Arkansas History Commission).

301. Ark. Sup. Ct. Opinion Book K, at 523 (on file with Arkansas History Commission).

302. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 426.

303. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 106.

304. *Wilde & Co. v. Hart*, 24 Ark. 599 (1867).

305. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 234.

306. *State v. Johnson*, 26 Ark. 281 (1871).

307. Ark. Sup. Ct. Washington Opinion Book, *supra* note 188, at 437.

308. An entry in the English Home Record, *supra* note 209, for March 10, 1865, states that English was "in Dixie" on that date. Since his wife had been evicted from their Little Rock home by the Union Army, the annual gathering to celebrate the laying of the home's cornerstone was held at the house of a friend where Mrs. English had taken refuge.

309. *Ark. Gazette*, Feb. 5, 1867, at 1.

310. ARK. CONST. of 1868, art. VIII (before 1873 amendment).

311. Act 9 of 18th Ark. General Assembly, 1871 Ark. Acts 13. English received two votes in the United States Senate election held later during the same session. House Journal of 18th Ark. General Assembly 716 (1871).

312. Ark. Sup. Ct. Judgment Record C-1, at 425 (on file with Univ. of Arkansas, Little Rock—Pulaski County Law Library Special Collections).

313. *Historical Report of Secretary of State*, *supra* note 30, at 450.

314. "Chief Justice English Dead," *Ark. Gazette*, Sept. 2, 1884, at 4.

315. *Historical Report of Secretary of State*, *supra* note 30, at 451.

316. "Judge Compton," *supra* note 20.

317. Hallum, *Biographical & Pictorial History*, *supra* note 13, at 367; Hempstead, *Historical Review*, *supra* note 13, at 454.

318. Brown, *Albert Pike*, *supra* note 215, at 428, 430-31, 433-442.

319. *Memphis Appeal*, Feb. 26, 1867, at 1; Feb. 26, 1867, at 1; Feb. 28, 1867, at 1; Mar. 1, 1867, at 1; Mar. 2, 1867, at 1; Mar. 5, 1867, at 1; Mar. 6, 1867, at 1; Mar. 7, 1867, at 1; Mar. 8, 1867, at 1; Mar. 14, 1867, at 1; Mar. 15, 1867, at 1; Mar. 16, 1867, at 1; Mar. 19, 1867, at 1.

320. *Ark. Gazette*, Feb. 5, 1867, at 1.

321. Brown, *Albert Pike*, *supra* note 215, at 443, 457-60, 468.